Supreme Court, U. S.
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79-1629

In the Supreme Court of the United States

October Term, 1979

No. 79-.....

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Petitioners,

vs.

DEBORAH A. NORTHCROSS, et al.,
Respondents,

and

CITY OF MEMPHIS, et al.,
Additional Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 23, 1979, a petition for rehearing having been denied on January 17, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 611 F.2d 624 and is reprinted in the Appendix, *infra*, at pages 1-A through 39-A. The District Court has issued three unreported Decisions which are the subject of this appeal. These are the District Court's "Ruling On The Application Of The Plaintiffs For Attorneys' Fees" dated March 24, 1976, and reprinted in the Appendix, *infra*, pages 40-A through 52-A; the "Award On Application Of The Plaintiffs For Attorneys' Fees" entered November 4, 1977, and reprinted in the Appendix, *infra*, pages 53-A through 62-A; and the "Ruling On Application For Attorneys' Fees And Expenses For May, 1977 Hearing" entered August 1, 1978, and reproduced in the Appendix, *infra*, pages 63-A through 74-A.

Prior reported Opinions in this matter are found at 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); 333 F.2d 661 (6th Cir. 1964); 420 F.2d 546 (6th Cir. 1969); 420 F.2d 548 (6th Cir.), *remanded*, 397 U.S. 232 (1970); 312 F. Supp. 1150 (W.D. Tenn. 1970), *remanded*, 444 F.2d 1179 (6th Cir. 1971); 444 F.2d 1184 (6th Cir. 1971); 341 F. Supp. 583 (W.D. Tenn.), *vacation of stay denied*, 463 F.2d 329 (6th Cir.), *remanded*, 466 F.2d 890 (6th Cir.), *stay denied*, 309 U.S. 909 (1972), *cert. denied*, 410 U.S. 926 (1973), *vacated in part and remanded on other grounds*, 412 U.S. 429 (1973), and 489 F.2d 15 and 19, *cert. denied*, 416 U.S. 962 (1974).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on November 23, 1979, and the Petition for Rehearing was denied on January 17, 1980.

QUESTIONS PRESENTED

1. In awarding an attorney's fee pursuant to 20 U.S.C. §1617 or 42 U.S.C. §1988, does a District Court retain its equitable discretion to reduce the award based on a finding that there were numerous issues on which plaintiffs did not prevail and that a high proportion of the hours claimed related to unnecessary services?

2. Does a District Court, in assessing such an award of attorneys' fees, have the authority to weigh the hours and hourly rates claimed against the Court's own knowledge of the case and expertise in determining fees?

3. Did the Court of Appeals, having enunciated a different standard for the exclusion of hours from that applied by the District Court, err in entering a final fee award rather than giving the District Court an opportunity to apply the new standard in light of its knowledge of the case, since:

   (a) There was no transcript of the 1977 Hearing on which the award was based, and the Court of Appeals was, therefore, in no position to determine whether or not the District Court would find some services to be unreasonable as well as unnecessary;

   (b) Without benefit of the record, the Court of Appeals found it necessary to make a priori judg-

ments as to the proper hourly rate for one of plaintiffs' attorneys and as to a proper percentage reduction for duplication of services?

4. Did the Court of Appeals err in holding that the District Court was obligated to award a fee for portions of the case occurring more than three years and up to eight years prior to the first filing of any application for a fee in this cause, and under circumstances where the District Court had found such a fee would be unjust?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of two statutes providing for attorneys' fees to prevailing plaintiffs in civil rights matters:

20 U.S.C §1617. *Attorney Fees*

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 U.S.C. §1988. *Proceedings in vindication of civil rights*

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This petition for writ of certiorari seeks to have the Supreme Court review a Decision of the United States Court of Appeals for the Sixth Circuit relating to the proper standards for determination of attorneys' fees in desegregation cases.

History of the Litigation

This case involves two separate awards of attorneys' fees against the petitioner, Memphis Board of Education. In the main portion of this case, the respondents seek a fee for services dating back to the original filing of this lawsuit in 1960. In this same portion of the case, an additional fee is sought against the added defendant, City of Memphis, based on several proceedings in which the Board of Education and the plaintiffs enjoined the City of Memphis from interference with the plan of desegregation. This was consolidated with an appeal from the District Court's subsequent award of attorneys' fees in a later hearing held in May, 1977.

The plaintiffs' original request for attorneys' fees in this cause was filed on August 1, 1974, following the adoption of a final plan of desegregation implemented at the

beginning of the 1973-4 school year. The 1977 hearing, which was the subject of a separate award, grew out of three motions brought by the Board of Education and consolidated for trial by the District Court. These motions related to (1) the Board's request for leave to renovate Westwood High School; (2) the Board's request for certain attendance modifications coupled with three school closings; (3) the Board's request for leave to implement certain optional school programs. At the conclusion of the hearing, the District Court reached a mixed result in which a majority of the Board's requests were rejected, but several of the attendance modifications, closings, and optional schools were approved over the plaintiffs' objections. The only one of the three motions to be totally resolved in favor of the position of either party was the motion for leave to renovate Westwood High School as opposed to the plaintiffs' requests that a new high school be constructed. The District Court, however, directed that a fee should be awarded the plaintiffs for this hearing, and this direction resulted in a separate fee award involved in the present petition.

Proceedings in the District Court

The District Court filed two separate Opinions in regard to the main award of fees in this case. With the approval of all parties, it was determined to have the District Court rule first on the general time periods and types of services which would be subject to a fee award. In that ruling, the District Court dealt with questions relating to the proper effect to be given 20 U.S.C. §1617 in relation to a fee application which was not pending at the time of that enactment. The District Court also addressed itself to the contention of the Board that the claim for fee should be reduced or eliminated on the basis of the numerous unnecessary positions which had been

taken by the plaintiffs throughout the litigation prolonging the lawsuit and requiring separate motions and hearings which otherwise would have been unnecessary. These included the plaintiffs' unsuccessful opposition to the final plan of desegregation - an opposition which necessitated an entirely separate hearing in April, 1973, at a time when the Board had filed a "Statement of Position" expressly seeking to have that same final plan adopted by the District Court. They also included an unsuccessful effort to cite the Board of Education for contempt; unsuccessful oppositions to construction requests; prolonged insistence on plans involving unfeasible times and distances of transportation; and unreasonable insistence on mid-semester implementation of the original busing plan.

Faced with this record, the District Court determined that it would not deny a fee in toto, but that the ultimate fee would be reduced to account for the plaintiffs' rejected assertions which prolonged or delayed the overall proceeding. With regard to timeliness, the District Court distinguished *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), on the grounds that the application for attorneys' fees was not pending at the time the attorneys' fee statute was enacted. The District Court, therefore, held that it would award an attorneys' fee under 20 U.S.C. §1617 beginning with the effective date of the statute on July 1, 1972, and that it would award a partial fee on grounds of obstinancy for services commencing with the date of the decision of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The District Court further held that an award of fees prior to that time would be unjust in view of the "lack of specific guidelines and the resulting trial and error experimentation" which prevailed prior to the *Swann* decision and in light of the delay of the plaintiffs in filing a fee petition in 1974 seeking recovery over a fourteen-year period. The District Court

also determined that it would grant a separate award against the City of Memphis based on the injunction proceedings in which the City had been made an additional defendant.

After submission of detailed briefs and affidavits, the District Court filed a further Decision on November 4, 1977, granting an award on the basis of the principles laid down in its earlier ruling. The plaintiffs were awarded fees for hearings in November, 1971, and March, 1972, which led up to the busing plan, but these fees were discounted by 50 per cent on the basis of the District Court's finding that the alleged "obstinance" of the Board of Education was only partially responsible for the hearings. The plaintiffs also received a partial award for the April, 1973, hearing which approved the final plan of desegregation proposed by the Board. This award was made pursuant to 20 U.S.C. §1617 and was discounted by 50 per cent to allow for the fact that the Board's position was entirely sustained as a result of the hearing and that the plaintiffs' proposed plan did not prevail. The Court's award also included allowances for expenses and a fee against the City of Memphis resulting in a total award of $28,600 in fees and $8,007.31 in expenses against the Board of Education. A total of $6,930.00 in fees and $323.26 in expenses was assessed against the City of Memphis.

On July 7, 1978, the District Court ruled on the issue of costs and attorneys' fees for the separate 1977 hearing. Noting that one of the three motions at issue had been resolved entirely in favor of the Board of Education and that there had been a mixture of results on the other two motions, the Court allowed a 20 per cent discount of the hours claimed as an adjustment based on the non-prevailing positions taken by the plaintiffs. After this adjustment, a total fee of $8,382.00 together with expenses of $5,200.16 was awarded against the Board of Education.

Proceedings in the Court of Appeals for the Sixth Circuit

On appeal, both decisions of the District Court were reversed. The Court of Appeals grounded its Ruling on the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, and held that that statute should be applied retroactively at least to the portion of the case going back to 1968. In spite of the plain language of the Act to the effect that the District Court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs", the Court of Appeals read the Act as depriving the District Court of its historical equitable powers in determining an adequate fee:

> "We begin our discussion of this statute by pointing out that in making fee awards in Civil Rights cases today, Courts are no longer applying their historical equitable powers to devise an adequate remedy."

Having made this determination, the Court of Appeals then held that the District Court lacked authority to discount the plaintiffs' fees on the basis of the large number of unnecessary and non-prevailing issues raised by the plaintiffs. It further rejected the District Court's finding that the lateness of the plaintiffs in applying for a fee and the extreme uncertainty of the law prior to the decision in *Swann, supra*, were equitable considerations which could be applied by the District Court.

The major portion of the case was remanded to the District Court for a recalculation of the fee based on the instructions of the Court of Appeals. The Court of Appeals, however, undertook to enter a final judgment as to the May, 1977, hearing. In doing so, it set aside the District Court's 20 per cent reduction in hours claimed on the grounds that the District Court erred in considering the

extent of the issues on which the plaintiffs failed to prevail. It substituted a 5 per cent reduction based on duplication of services but granted a 10 per cent upward adjustment in the regular hourly rates on the basis of the allegedly contingent nature of the compensation. The Court of Appeals also rejected the District Court's finding that $75.00 per hour was reasonable compensation for lead counsel. The Court of Appeals substituted its own judgment for that of the District Court, allowing lead counsel the claimed $125.00 base hourly rate for courtroom time, but finding on its own judgment that this claim was excessive for office hours. The Court of Appeals arrived at an a priori figure of $82.50 per hour for office time of lead counsel, instead of the District Court's $75.00 per hour. It is noteworthy that all of these determinations were made in the absence of any transcript of the May, 1977, proceedings. Since this hearing had not been appealed by either party, the transcript had never been written, and the Court of Appeals had no independent means of evaluating the issues and results of that hearing.

Based on this approach, the Court of Appeals directed entry of a final judgment in the amount of $22,604.02 as fees, costs and expenses for the 1977 hearing, as opposed to the $13,582.16 awarded by the District Court.

REASONS FOR GRANTING WRIT

Petitioners submit that the present case involves issues of great importance regarding the proper standards for assessing attorneys' fees in desegregation cases and in other civil rights cases. As noted by the dissent in the Court of Appeals, there are many pending cases to which the standards enunciated in the Court of Appeals decision will be applied. Since the Court of Appeals for the Sixth Circuit has adopted a distinctly different approach from the other

circuits, it is appropriate for this Court to enunciate a nationwide standard.

The Split Among the Lower Courts Regarding Non-Prevailing Issues

The Opinion below flatly rejected the District Court's reduction of hours based on the high proportion of issues as to which the plaintiffs did not prevail. It did so based on its conclusion that 42 U.S.C. §1988 has eliminated the equitable powers of the District Court to devise an adequate remedy. In reaching this conclusion, the Decision below is squarely at odds with the Decision of the Court of Appeals for the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978). There the Court held that:

> "Given the legislative history and case law cited above, we conclude that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. *However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful.*" (Emphasis added). 581 F.2d at 278.

The same approach has been adopted by numerous other courts in the context of fees under the 1964 Civil Rights Act. These cases are relevant in light of the legislative history of 42 U.S.C. §1988, indicating that "It is intended that the standards for awarding fees be generally the same as under the 1964 Civil Rights Act." 2 U.S. Code Cong. and Admin. News, p. 5912, Senate Rep. No. 94-1011. These cases include *Schaeffer v. Yellow Cab Co.*, 462 F.2d 1002 (9th Cir. 1972) in which the Court held:

> ". . . the amount of the award should also be proportionate to the extent to which the plaintiff prevails

in the suit. We believe that the district court should reconsider the award of attorney's fees in light of our decision that plaintiff is entitled to a small portion of the back pay claimed by her."

Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976); and *Morton v. Charles County Board of Education*, 373 F. Supp. 394 (D.C. Md. 1974).

The Decision below is also most remarkable in light of the plain language of the attorney's fee statute. Far from suggesting that the statute is intended to restrict the broad equitable judgment of the District Court, the statute contains very plain discretionary language to the effect that ". . . The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Right of the District Court to Weigh Hours and Hourly Rates Against Its Own Expertise

The Opinion below squarely departs from cases in other circuits in greatly restricting the ability of the District Court to assure fundamental fairness to a defendant. In *Johnson v. Georgia Highway Express*, 488 F.2d 714, at 717, it was acknowledged that the District Court must "weigh the hours claimed against [its] own knowledge, experience and expertise of the time required to complete similar activities." In the present case, the Court of Appeals has largely eliminated the District Court's power to apply its general expertise and has held that hours may be eliminated only on the basis of an itemized reply to the items set forth in plaintiffs' affidavits. It is difficult to see how a District Court, in adopting this approach, can deal with a claim in which it believes that the hours were generally excessive. In the present case, for example, the

District Court was presented with affidavits covering many hundreds of items occurring over a thirteen-year period. The practical effect of the Court of Appeals' Decision is to give these affidavits of admittedly estimated hours a disproportionately high importance and to restrict the independent expertise of the District Court. A District Court may very properly and correctly find that overall time spent in preparation of a particular lawsuit is excessive and yet be in no position to determine which particular conferences, witness interviews or hours spent in research are the ones to be deleted in conformity with the item-by-item approach envisioned by the Court of Appeals.

The Time Period Covered by the Award

An additional split among Courts of Appeals appears in the disregard of all time factors relating to the application for a fee which is seen in the Court of Appeals' Opinion in this case. The Court of Appeals set aside not only the District Court's construction of the attorney's fee statutes but also the District Court's express findings that equitable factors of extreme delay in filing and of previous flux and uncertainty of the law should eliminate some portions of the fee. The result is to require the District Court to award a fee for services occurring up to six years prior to the filing of the first application for fees in this case and to create the possibility that the District Court may award a fee for services rendered up to fourteen years prior to the filing of the petition. This is in contrast to the decision of *Wheeler v. Durham City Board of Education*, 585 F.2d 618 (4th Cir. 1978). In that case it was noted that "The accomplishment of a unitary system of schools in Durham and Durham County occurred in several discrete steps . . . ." The Court accordingly held that earlier phases of the case were not reopened for purposes of at-

torneys' fees by the subsequent passage of enabling legislation. As the Court observed,

> "But if a stage in the proceeding is final for the purpose of making a contemporaneous award of attorneys' fees, we think that it cannot also be pending so as to justify an award of attorneys' fees years after an order terminating that stage of the proceedings was entered. Of course, the reason why plaintiffs waited so long to assert their claim to fees is obvious. Until the enactment of §1617 in 1972, attorneys' fees were seldom awarded. Nonetheless, we do not think that §1617 authorizes an award of attorneys' fees after such a delay." 585 F.2d at 622-3.

In the present case, the Court of Appeals also makes an unfounded assumption in suggesting that there was no appropriate time for the plaintiffs to submit an application for attorneys' fees during the various stages of the disposition of their 1968 motion for further relief. This is inconsistent with the holding of *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), in which it is held that plaintiffs are not bound to await the final outcome of the case but are free to make application upon the final disposition of interim matters. The plaintiffs have, accordingly, been able at all relevant times to submit an application for fees with respect to particular hearings and interim matters while these items are still fresh in the minds of the Court and the litigants and while it is not necessary to have subsequently-employed attorneys attempt to reconstruct the history of the case and to estimate hours spent on the basis of records going back over a decade and a half. As held in *U. S. v. Pinto*, 44 F.R.D. 357 (W.D. Mich. 1968), delay itself may become a bar to a petition for costs or fees even where there is no established court rule setting a definite time period.

Violation of Standards of Appellate Review

This case is also of importance in light of the violation by the Court of Appeals of the normal standards of appellate review. As envisioned by the Attorney's Fee Acts themselves, an award of attorney's fees should in the first instance be made by the District Court. Such an award should not be disturbed unless there is a clear abuse of discretion. See, for example, *Culpepper v. Reynolds Metals Co.*, 422 F.2d 1078 (5th Cir. 1971). In the present case, the Court of Appeals failed to give the District Court the opportunity to weigh the award for the May, 1977, hearing in light of the principles being enunciated in the decision. Without the benefit of the transcript of that hearing, it undertook to make a final award in the case. This deprived the District Court of the possibility of finding the services which it had eliminated as non-prevailing and unnecessary might also be eliminated under the new standard of "unreasonable" services being enunciated by the Court of Appeals. Certainly the Court of Appeals was in no position to pre-judge the disposition which the District Court might make of this issue.

This entry of a final decision also resulted in a remarkable series of a priori judgments by the Court of Appeals. These involved an estimation of the proper percentage allowance for contingency factors, for duplication of attorneys' services, and even for the appropriate hourly rate with respect to the plaintiffs' lead counsel. At the District Court level, a claim had been made for $125.00 per hour for services of lead counsel. The District Court had reduced this claim to $75.00 per hour. The Court of Appeals accepted the $125.00 per hour rate for trial time but reduced the claim to an $80.00 per hour base rate (increased by a 10 per cent contingency factor) for non-trial time.

It is difficult to imagine how the Court of Appeals could have held the $75.00 hourly rate of the District Court to be clearly erroneous or an abuse of discretion and then returned *sua sponte* to an $80.00 base rate for portions of these same services.

The entire handling of the separate fee application shows an approach to the subject of attorneys' fees which is at odds with all normal standards of appellate review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition For Writ Of Certiorari should be granted to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies each of the foregoing Petition for Writ of Certiorari have been served on the following attorneys, by forwarding said copies by United States mail, postage prepaid, to their respective business addresses, this the 15 day of April, 1980:

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ERNEST G. KELLY, JR.

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BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
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and
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Additional Defendants

Appendix To
Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Opinion of the United States Court of Appeals
for the Sixth Circuit

Nos. 78-1289, 78-1290, 78-1291, 78-1458, 78-1459

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Appellants
Cross-Appellees,

v.

BOARD OF EUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,
Defendants-Appellees
Cross-Appellants,

and

CITY OF MEMPHIS, ET AL.,
Added Defendants-Appellees
Cross-Appellants.

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Appellants
Cross-Appellees,

v.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,
Defendants-Appellees
Cross-Appellants

} APPEALS from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed November 23,1979

Before: WEICK and CELEBREZZE, Circuit Judges and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the Court in which CELEBREZZE, Circuit Judge, concurred. WEICK, Circuit Judge, (pp. 33-36) delivered a separate opinion, concurring and dissenting in part.

PECK, Senior Circuit Judge. These appeals challenge the award of fees made by the district court in the course of the Memphis school desegregation case. In this opinion, the Court will address a few of the remaining legal controversies concerning the proper application and interpretation of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes an award of attorneys' fees to prevailing parties in certain civil rights cases, and sets out standards for the guidance of the district courts in this Circuit to aid them in the exercise of their discretion in the granting of such fees. The first award was made in 1977 [hereinafter, the "1977 Fee Award"] during a temporary lull in the litigation of the underlying case, and following the final judicial approval of an adequate desegregation plan. The second award [the "1978 Fee Award"] was granted to compensate for subsequent services rendered to the plaintiffs in the course of their opposition to the School Board's attempt to modify the plan. The plaintiffs, the School Board and the City of Memphis have all appealed from the awards made by the district court.

I. THE BACKGROUND OF THE CASE

Since these appeals concern only the two fee awards granted by the district court, a detailed explanation of the long, complicated history of this bitterly contested school desegregation case is not necessary. A general description is all that is required to give an understanding of the scope and quality of representation provided by the plaintiffs'

attorneys in the course of the last two decades.

The underlying fact is that in 1960, when this suit was first filed, the Memphis schools were segregated on the basis of race, and today an effective, final order of desegregation is in operation. It has required years of constant litigation, numerous reported decisions and several trips to the Supreme Court to achieve that result. The suit was filed in 1960, and was dismissed by the district court. This Court reversed that decision in 1962, and remanded for development of a desegregation plan. A limited plan was adopted in 1963, and a year later, this Court again reversed, rejecting the plan as inadequate. Nearly two years later, in 1966, a modified plan wastentatively approved by the district court, and an uneasy state of repose was reached. While the plaintiffs objected to some aspects of the plan, their motion for an injunction was denied. At the same time, however, the Board was put on notice by the court that some aspects of the plan needed further study and additional relief might be ordered in the future.

Nothing further of significance occurred for nearly two years, when the Supreme Court rendered its historic decision in *Green* v. *County School Bd.*, 391 U.S. 430 (1968), Making it clear that the plaintiffs were entitled to further relief which would have real prospects of dismantling the state-imposed dual system at the "earliest practicable date." The plaintiffs promptly moved for further relief, and the case geared up again, not to slow down for years to come.

For the next four and a half years, the case moved at a steady pace back and forth between the district court, this Court and the Supreme Court, as one phase after another of an effective, comprehensive desegregation plan was hammered out. In 1973, a new twist was added when the City of Memphis attempted to block desegregation by

enforcing a city ordinance requiring that certificates of public convenience and necessity be obtained before operating transportation vehicles within the city, withholding funds from the School Board and refusing to supply gasoline to the Board. These matters were all ultimately resolved against the City.

In April of 1974, the Supreme Court denied plaintiffs' petition for certiorari seeking review of this Court's decision approving "Plan Z," a desegregation plan proposed by the Board. With that action, this case entered another period of temporary repose, with an effective desegregation plan finally in operation. Soon after, the plaintiffs filed their application for attorneys' fees and costs, after being unable to reach any settlement with the defendants. This first application was initially based upon 20 U.S.C. § 1617, the Emergency School Aid Act, which had become effective July 1, 1972. Not until November 4, 1977, did the district court enter its final order partially granting the plaintiffs' request. This appeal was taken by the plaintiffs from that award, and the defendants have both cross-appealed.

In the meantime, a new controversy had flared up, when the School Board sought substantial modification of Plan Z which would have slowed down and undermined the progress of desegregation. A five-day trial was held in 1977, and the defendant's proposals were, for the most part, rejected by the court. In 1978, the district court awarded attorneys' fees to the plaintiff to cover the services rendered in connection with the 1977 hearing, but again, only partially granted the plaintiffs' request for fees and costs. The plaintiffs also filed an appeal from that award, and the two appeals have been consolidated for resolution in this opinion, as they raise many of the same issues.

II. THE RULINGS OF THE DISTRICT COURT

A. The 1977 Fee Award: In their first application for fees, the plaintiffs requested compensation for all documented hours spent on the case since it was first filed in 1960. They argue that they are entitled to fees for services rendered before the emergency School Aid Act was passed since in *Bradley* v. *Richmond School Board,* 416 U.S. 696 (1974), the Supreme Court held that the normal rule that a newly enacted statue will apply to all pending cases meant that an award for services rendered before 1972 could be made so long as the case was pending when the statute was enacted.

The district court rejected this position, ruling that *Bradley* only applied when there was an application for *fees* pending on the date the act became effective; otherwise, the statue only authorized fees from the date of its passage. Since no application for fees was pending in 1972, it held that the plaintiffs could not recover fees based upon the Act for the period prior to 1972. However, the Court also held that the defendant's conduct between 1968 and 1972, after the decision in *Green*, had been "obstinate and obdurate" in refusing to recognize its duty to devise an effective desegregation plan. Therefore, under its common-law equitable powers, the Court awarded limited fees for the period.

The Court went on to hold that in the pre-1968 period, the state of the law was so uncertain that the defendant's conduct in resisting desegregation could not be considered to have been in bad faith. For the same reason, the court commented in *dicta* that even if it was wrong about the retroactivity of § 1617, this same uncertainty about the requirements of the law would render any award of attorneys' fees unjust, under the limitation which the Supreme Court had established in *Northcross* v. *Bd. of Education of Memphis City*

Schools, 412 U.S. 428 (1973), holding that an award of fees pursuant to § 1617 should be routinely granted to a prevailing plaintiff unless unusual circumstances would render such an award unjust. The court also held that the City of Memphis was liable for attorneys' fees for the services rendered in opposition to the City's attempt to block desegregation.

A separate hearing was conducted to determine the amount of fees to be awarded pursuant to this ruling establishing the plaintiffs' entitlement to fees. In the meantime, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, was passed, and the plaintiffs moved for reconsideration of their petition pursuant to the new Act. The court ruled that the new Act did not apply because a final order had been entered in the case in 1974, prior to passage of the Act.

The plaintiffs total request for fees under the 1977 Fee Award is set out in chart form below; with the services devoted to challenging the City's actions in parentheses:

Attorney	Hours	Hourly Rate	Base Fee	Adjustment Factor	Award
Lucas	1375	$ 75	$103,125	2.5	$257,812.50
	(89)		(6,675)		(16,687.50)
Caldwell	1706	60	102,360	2.5	255,900.00
	(163)		(9,780)		(24,450.00)
Noel	46	50	2,300	2.5	5,750.00
	(33)		(1,650)		(4,125.00)
Pre-1968 Memphis Counsel	672	75	50,400	2.5	126,000.00
Chachkin	829	100	82,900	2.5	207,250.00
	(22)		(2,200)		(5,500.00)

Pre-1968 New York Counsel	211	100	21,100	2.5	52,750.00
Total	4839		$362,185	2.5	$905,462.50
	(307)		(20,305)		(50,762.50)
			EXPENSES:		$32,168.72
					(477.01)
			TOTAL AWARD:		$937,631.22
					(51,239.51)
					$988,870.73

As mentioned above, the court ruled that the plaintiffs were entitled to no compensation at all for the pre-1968 services. For the services rendered between 1968 and 1972, the court stated, without explanation, that the "necessary services" rendered by plaintiffs' counsel added up to 816 hours. This ruling eliminated, without any articulated reason, 347 documented hours of service provided by plaintiffs' counsel. The court went on to rule that the defendats's "obstinate and obdurate" conduct had caused the expenditure of one-half of this time. Thus, the plaintiffs were entitled to compensation for 408 hours of attorney time for services rendered between 1968 and 1972.

After 1972, the Emergency School Aid Act clearly authorized an award of attorneys' fees to the prevailing plaintiff for all "necessary" services. The district court concluded that necessary meant services provided in pursuing issues and arguments as to which the plaintiffs prevailed. Since the plaintiffs had sought a more comprehensive desegregation plan than was ultimately adopted, the court held that to a certain extent, the plaintiffs had not prevailed, and their attorney's services were not necessary. To account for this factor, the Court cut the plaintiffs' attorneys' documented time by half. In addition, without any explanation, the court simply eliminated 561.5 hours of documented time. This left a

total of 120 hours of attorney time, for which the court concluded the plaintiffs were entitled to be compensated. The court furthermore excluded altogether the services of the NAACP Legal Defense Fund attorney, stating that "there has been no showing that his services were necessary in addition to the services of local counsel."

For the approved hours, the court awarded hourly fees of $60 for lead counsel Lucas, and $40 for some of attorney Caldwell's services, $60 for the remainder. The total fee awarded against the School Board for (at that time) fifteen years of service in the interest of the plaintiffs' civil rights, was $28,600. The plaintiffs had sought the normal billing rates of their attorneys, which ranged from $50 to $100 per hour, adjusted upward by a factor of 2.5, to account for the various factors which have been held in similar cases to warrant a higher-than-normal fee.

In the same order, the district court granted fees against the City of Memphis to compensate the plaintiffs for the costs they incurred in opposing the City's attempt to block busing. However, it disallowed the fees claimed for the services of the Legal Defense Fund lawyer, and eliminated all the hours devoted to the fees issue and to the anti-trust/civil rights conspiracy charge which the plaintiffs had filed against the City but which was dismissed when the City agreed to supply the necessary gasoline.

Finally, as to costs, the court awarded only part of the plaintiffs' request for out-of-pocket expenses. It denied all costs incurred prior to 1971, apparently concluding (although without discussion) that if there was no statutory authorization for attorney's fees, costs were not recoverable either. It also denied over $5000 in expert witness fees and expenses, over $3000 for transcripts, nearly $2000 for attorney's travel expenses and over $800 in photocopying costs.

B. The 1978 Fee Award: The 1978 award, concerned only with services rendered during the 1977 hearings on the Board's proposed amendments to the desegregation plan, did not involve the difficult legal issue of retroactivity. The Civil Rights Attorney's Fees Act had been passed and was in effect at the time the services were rendered. The plaintiffs' lawyers submitted affidavits supporting their request for the following award of fees and expenses:

Elijah Noel, Jr.81.75 hrs x $ 60.00 per hour	$ 4,905.00
Louis R. Lucas61.50 hrs. x $125.00 per hour	7,687.50
Richard B. Fields 128 hrs. x $ 40.00 per hour	5,120.00
Incentive award of 100%	17,712.50
Out-of-pocket expenses	7,788.96
TOTAL	$43,213.96

(This chart has corrected the mathematical errors in the plaintiffs' first submission to the district court.)

The court held, however, that because the plaintiffs had only "partially prevailed," and had not prevailed as to "parts of some issues," the time claimed would be reduced by 20% to eliminate the hours spent on matters as to which the plaintiffs did not prevail. the court also found that the attorneys' hourly rates were excessive, noting that it had only awarded them $60 per hour for lead counsel and $40 per hour for assistant counsel in the 1977 award. The court awarded Lucas $75 per hour, Noel $60 per hour, and Fields $40 per hour, noting that the experience of the attorneys was the determining factor in setting the different rates.

The court further held that the use of three attorneys had caused the duplication of some work, and excluded, without further explanation, 74 hours of time documented by the attorneys. The court also held that no "incentive" or "bonus" factor was authorized to increase the amount of the award.

Finally, the court awarded the plaintiffs only a portion of their claimed out-of-pocket expenses. It cut in half their expenditures for an expert witness, the salaries of student assistants in connection with the preparation of a pupil-locator map, and for photocopying.

We conclude that both orders granting attorneys' fees and expenses provide inadequate compensation, contain legal errors, and reach factual conclusions not supported by the record. The 1977 Fee Award must be remanded for further proceedings in accordance with the standards set out in this opinion. The record as to the 1978 Fee Award is adequate, however, for us to independently assess an appropriate award, *see Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir. 1979), and we do so to demonstrate the findings and conclusions which we hold that district courts must enter in the record in making fee awards. We understand that the findings of fact which are required to substantiate a court's exercise of its discretion in making a fee award are frequently very complicated. Nevertheless, both the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award. The plaintiffs are entitled to some explanation of the reasoning used to exclude those hours which were cut, and some description of the findings which were relied upon to find that expenses and billing rates were excessive. Any review of the court's awards in this case would require substantial amounts of sheer conjecture on our part, as we speculate as to reasons why the court might have cut certain documented hours. In jact, it is impossible to tell whether the district judge might not have simply overlooked certain services provided by plaintiffs' attorneys. Certainly no more substantial reason appears in this record.

III. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

In this opinion, we will discuss only the 1976 Act. We see no substantial differences between the provisions or purposes of the Act and the Emergency School Aid Act, and contrary to the conclusion of the district court, hold that the 1976 Act was clearly applicable to both fee awards because the case was "pending" at the time it was passed. *Bradley, supra*, 416 U.S. 696; S. Rep. No. 94-1011, 94th Congress, 2d Sess. (June 29, 1976).

We begin our discussion of this statute by pointing out that in making fee awards in civil rights cases today, courts are no longer applying their historical equitable powers to devise an adequate remedy. That power was sharply limited in *Alyeska Pipeline Serivce Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which rejected any inherent power of the courts to award fees when the plaintiffs were functioning as private attorneys general, and ruled that any authorization for fees in such situations would have to come from Congress. Congress responded, enacting the Civil Rights Attorney's Fees Awards Act expressly to fill the void left by *Alyeska*. This statue did more than simply enable the lower courts once again to award fees; rather than being an equitable remedy, flexibly applied in those circumstances which the *court* considers appropriate, it is now a *statutory* remedy, and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees. Therefore, a close examination both of the statute itself and its legislative history is necessary before we turn to a discussion of the particular legal issues raised by this case.

The Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. § 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Acts of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This amendment was the Senate version of the bill, and the relevant legislative history is found in the Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Ad. News 5908. Congress expressly commands the courts to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws. The Report comments that in accordance with the law established under the 1964 Civil Rights Act, the prevailing party should "ordinarily recover attorney's fees unless special circumstances would render such an award unjust." In accordance with the broad remedial purpose of the statute, parties may be considered to have prevailed when they have vindicated important rights through a consent judgment or without formally obtaining relief. Furthermore, Congress gave some express guidance as to the standards to be used by the courts in the mechanical calculation of the amount of fees to be awarded. the amount of fees is to be governed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." Congress mandates that the fact that the rights involved are nonpecuniary is not a matter for us to consider in making an award. Particulary important to this case is the instruction that counsel for the prevailing party should be paid, "as is traditional with attorneys

compensated by a fee-paying client, for all time reasonably expended on a matter." The goal to be achieved, according to the Senate Report, is to make an award of fees which is "adequate to attract competent counsel, but which do no produce windfalls to attorneys."

As we noted in *Seals* v. *Quarterly County Court*, 562 F2d. 390, 394 (6th Cir. 1977), Section 1988 is a rare statute with sufficient legislative history to provide.

> A clear-cut indication that congress considered [many of] the exact problem[s] with which we are now confronted and provided an express indication as to how the general language of the 1976 statute was intended to be applied. Under such a circumstance (relatively rare in this court's experience), we, of course, follow Congressional intent.

With these instructions from Congress in mind, we turn to a review of the district court's two fee awards in this case.

IV. THE 1977 AWARD

A. Retroactivity of the Fees Awards Act: This issue has been firmly resolved by this Court. The Fees Awards Act applies to any case which is pending or which had not been finally resolved prior to its passage. This is not a matter of "retroactivity," it is simply an applicastion of the traditional rule that a court applies the law which is in existence at the time it renders its opinion, unless there is statutory history to the contrary or doing so would result in manifest injustice.

This Court has already ruled that 1988 authorizes compensation for services rendered prior to its enactment, and both Supreme Court authority and clear legislative history support our conclusion. In

Weisenberger v. *Huecker, supra*,539 F.2d 49, the merits of the case were resolved well before passage of the Act, but the application for attorneys' fees had not been resolved when the Act became effective. The Court held that "[s]ince the Act was in existence at the time the district court made the fee awards, it is applicable to the instant cases." *Id.* at 53. The legislative history expressly states that the statute is intended to apply to all "pending" cases, and "pending" means that all the issues in the case have not been finally resolved. So long as there was an active controversy in case at the time the Act became effective, the Act applies to authorize fees for the entire case, unless special circumstances exist which would make an award manifestly unjust. The posture of this case at the time the award was made was indistinguishable from that in *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the Supreme Court was faced with another protracted school desegregation case. Relying on its equitable powers, the district court had awarded fees for services performed during the year prior to the passage of the Emergency School Aid Act. While the award was on appeal, the Act became effective. The Court of Appeals held, however, that only services rendered after the effective date of the Act were compensable. The Supreme Court reversed, applying the principle that "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 71.

In this case, plaintiffs filed their application for fees in 1974, relying upon the Emergency School Aid Act and the district court's equitable powers. In 1976, while the issue was still pending before the district court, the Civil Rights Attorney's Fees Awards Act was passed. The district court erred in refusing to apply the new statue to the pending application for fees. The situation is

indistinguishable from *Bradley*, and the court had the benefit of an express instruction from Congress that the new statute was to apply to all pending cases. *See* Sen. Rep. No. 94-1011, *supra.*

After concluding that the "lack of specific guidelines and the resulting trial and error experimentation" in school desegregation cases prior to 1968 when the Supreme Court deceded *Green* precluded an equitable award of fees based on the defendant's bad faith in the conduct of the suit, the district court went on to comment, in *dicta*, that even if it was wrong about the retroactivity of the attorney's fees statutes, the *same* considerations, coupled with the plaintiffs' failure to request fees at an earlier date, precluded a statutory award of fees. The district court stated that, in its opinion, these factors amounted to special circumstances which would render an award of fees manifestly unjust. We disagree.

We have the benefit of a Supreme Court decision discussing the "special circumstances" which would be necessary to defeat a statutory fee award. *Bradley, supra,* 416 U.S. at 716, explored aspects of this special judicial limitation on the statute. It noted that such "injustice" was particularly likely in a private suit between two parties. The factors to be considered were "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717. The Court pointed out that plaintiffs in school desegregation cases were "private attorneys general" operating at a tremendous disadvantage to the defendants in terms of finances and resources. These cases are a matter of "great national concern," and are not mere differences between provate individuals. Also, in an attorney's fee issue, a change in the law has no effect on any party's "right that has

matured or become unconditional." Id. at 720. Finally, no additional or unforeseeable obligation is being imposed upon the defendants because attorney's fees may ultimately have been awarded against them based on the court's equitable power; the new statute "merely serves to create an additional basis or source for the Board's potential obligation to pay fees." *Id.* at 721.

Once again, we find the factors in *Bradley* to be indistinguishable from those here. This case is also a school desegregation case involving great disparity between the resources of the parties. The new statute affects no vested or matured rights of the defendant. Finally, the statute simply confirms the possibility of an award of attorney's fees; not only was there always the possibility that the court would invoke its equitable powers to award fees, but it in fact did so, finding as a fact that the School Board had engaged in "obstinate and obdurate" behavior during at least a portion of this case.

Thus the district court was incorrect in its ruling that it had no statutory authority to award fees for services rendered prior to 1972, and the case must be remanded for a determination of a reasonable fee for that period. The fee awarded should cover at least the period back to 1968 when the suit became active again following the Supreme Court's *Green* decision.

This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. Certain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair. In some circumstances, it would be unfair to award fees against defendants who entered the suit principally as amici curiae to give the court another perspective on the issues involved. *See Wilderness Society* v. *Morton*, 495 F.2d 1026 (D.C. Cir. 1974),

reversed on other grounds, 321 U.S. 240 (1975). However, we reject the notion that mere uncertainty in the law is a "special circumstance" justifying rejection of the statutory remedy. a major purpose of the Fees Awards Act was to encourage the bringing of suits in new and undeveloped areas of civil rights law, and it would be anomalous indeed if we were to deny fees for the very reason the statute was passed. Finally, the plaintiffs' delay in applying for fees (which was largely due to the fact that there was no earlier appropriate time to pause for litigation of the fee issue, at least not since 1966) is hardly grounds for denying fees. The defendants have failed to point to any prejudice or harmful effects on them as a result of the plaintiffs' delay. The prejudice, if any, has inured to plaintiffs' attorneys who have provided years of service without compensation in hand. This is not a case where, years after a case has been finally disposed of, the prevailing party seeks to reopen the case to litigate the fee issue. *Cf. United States* v. *Pinto*, 44 F.R.D. 357 (W.D. Mich. 1968).

There is an unresolved dispute concerning the pre-1968 period, which we leave to the district court to resolve. The School Board contended below that the district court action of July 29, 1966, the last action before the Supreme Court's *Green* decision, was a "consent order" which undertook to dispose of all outstanding phases of the case, including fees and costs. It is true that a long, complicated case of this sort can result in several "final" orders, which in the interests of finality are deemed to dispose of all foregoing issues. Absent a timely appeal, a party is bound by the order and any later challenge is deemed to be a collateral attack judged by different, and more stringent standards than on direct review. *Bradley, supra*, 416 U.S. at 710-11. If the defendants are correct in their characterization of the 1966 action in the interest of

finality, plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees. We leave this matter to the district court. However, from 1968 until shortly before the application for fees was made by the plaintiffs, the case was in continuous, active litigation. Not only was there no "final judgement" which could reasonable be said to settle the issue of fees during that period, but there was no time to raise the matter of fees at all.

B. **The Prevailing Party Problem:** This legal issue is common to both awards. The district court concluded that the plaintiffs were the "prevailing party," thus entitling them to fees under the statues. However, it then concluded that those fees could be cut because the plaintiffs had *not* prevailed on some "issues or parts of issues." In the first award, the district court cut the plaintiffs' attorneys' hours by half to account for this factor, and in the second award, reduced the award by 20 per cent.

This approach is not proper under the Fees Awards Act. The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts or issues as to which the plaintiffs did not prevail," especially by

decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonable expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues." Furthermore, it would hardly jurther our mandate to use the "broadest and most flexible remedies available" to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith. The fact that these lawyers advocated a desegregation remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed; the Memphis school system is desegregated.

The district court also cut certain hours from the plaintiffs' request against the City of Memphis, primarily those hours spent on the suit which had been filed against the city but which was dismissed when the City agreed to supply adequate gasoline to the School Board. In spite of the lack of a formal order, the plaintiffs still obtained the relief which they sought, and are entitled to compensation. As noted in the Senate Report, prompt and reasonable settlement is to be encouraged, and thus the notion of "prevailing party" is to be interpreted in a practical, not formal, manner.

C. **The Calculation of a "Reasonable Fee":** This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a

marked failure on the part of the district courts to explain their reasoning, make necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable. We therefore conclude that a uniform approach to awarding fees, with a requirement that the district court make clear and adequate findings of fact on the record, is necessary in order that we may discharge our statutory duty to award a "reasonable" fee. That which is arbitrary or conclusroy is not reasonable, and is not fair to either of the parties involved.

i. **Hours of service provided:** We conclude that a fee calculated in terms of hours of service provided is the fairest and most manageable approach. The district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims. In complicated cases, involvtially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services. *Oliver* V. *Kalamazoo Bd. of Educ.*, 576 F.2d 714 (6th Cir. 1978). Such an approach seems preferable to an attempt to pick out, here and there, the hours which were duplicative.

Beyond this allowance for duplicative services, however, we hold that if a district court decides to eliminate hours of service adequately documented by the attorneys, it must identify those hours and articulate its

reasons for their elimination. The district court's failure to do so in this case renders its award virtually unreviewable. It has simply eliminatd, without comment, hundreds of hours of documented service. The 1977 Award must therefore be remanded for entry findings of fact and conclusions of law adequate to permit our review of the award. *Monroe* v. *Bd. of Comm'rs of Jackson*, 505 F.2d 105, 109 (6th Cir. 1974). To the extent that the district courts' unspoken assumptions about awards of attorneys' fees are inconsistent with this opinion, the award should be recalculated.

The plaintiffs have attempted, largely by guesswork, to identify which hours of service in the 1977 Award were excluded from consideration. While this Court does not render advisory opinions, it appears that many of the hours were excluded for improper reasons. therefore, we review a few established principles of law, for the benefit of the district court on remand. While necessary services performed by attorneys which could reasonable have been performed by less expensive personnel may be compensated at a lower rate than an attorney's normal billing rate, they should not be excluded altogether. Services relating to the various appeals taken in this case are compensable, and the district court, with its greater facility for evidentiary hearings and fact-finding, should make awards for appellate services in the first instance, subject to our review. *Weisenberger* v. *Huecker, supra,* 593 F.2d 49, *Perkins* v. *Standard Oil Co. of Calif.*, 399 U.S. 222 (1970). Services devoted to reasonable monitoring of the court's decrees, both to insure full compliance and to ensure that the plan is indeed working to desegregate the school system, are compensable services. They are essential to the long-term success of the plaintiff's suit. While we express no opinion as to whether *prospective* fees may be awarded to cover anticipated

monitoring services, as was done in *Lindy Bros. Builders, Inc.* v. *American Radiator & Stand. Sanitary Corp.*, 540 F2d 102, 121 (3d Cir. 1976) (en banc), it is clear that if such services have already rendered, they should be compensated. *Pete* v. *U.M.W. Welfare & Retirement Fund of 1950,* 517 F.2d 1275, 1291 (D.C. Cir. 1975). Finally, this Court has recently held that in order to effectuate the purposes of the Civil Rights Attorney's Fees Awards Act, the plaintiffs should recover attorneys' fees for the time spent litigating the fees issue itself. *Weinsenberger, supra,* 593 F.2d 49.

A factor which the district court did expressly take into account in eliminating hours was its view that the services of the NAACP Legal Defense fund had not been shown to be necessary. As noted above, the use of a number of attorneys frequently results in some duplication fo effort, and a district court may take this factor into account by deducting some small percentage of the total hours. It is impermissible, however, to eliminate wholesale the services of attorneys without identifying the particular services which are regarded as duplicative. the NAACP attorneys provided the plaintiffs with many hours of service which were not provided by anyone else, particulary in connection with litigation in this Court and the Supreme Court. The services provided by the Legal Defense Fund clearly had to be provided by someone, and fact, the attorneys' intimate familiarity with the issues involved in desegregation litigation undoubtedly meant that their time was far more productive in this area than would be that of a local attorney with less expertise. We hold that the district court's exclusion of the services of the Legal Defense Fund from consideration for a fee away was an abouse of discretion.

ii. **A reasonable hourly rate:** We have indicated in several opinions that it is desirable, whenever possible, to

vary the hourly rate awarded depending upon the type of service being provided. Again turning to our mandate to award fees "as is traditional with attorneys compensated by a fee-paying client," a scale of fees as is used by most law firms is appropriate to use in makin fee awards pursuant to Section 988. The use of broak categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee.

In determining what the level of compensation for each category of service should be, the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance.

Focussing on the fair market value of the attorney's services will best fulfill the purposes of the Fees Awards Act, by provideing adequate compensation to attract qualified and competent attorneys without affording any windfall to those who undertake such representation. The entire purpose of the statutes was to ensure that the representation of important national concerns would not depend upon the charitable instincts of a few generous attorneys.

For the same reason, as we established in *Oliver* v. *Kalamazoo Bd. of Educ.*, 576 F.2d 714 (6th Cir. 1978), a "bonus" multiplier, awarded "to compensate the attorneys for vindicating important but often unpopular constitutional rights",*id.*, 715, is not authorized by either the Emergency School Aid Act or by Section 1988. Such

a "bonus" would indeed be a "windfall," unnecessary to attract competent counsel, and grossly unfair to the defendants, who in most cases will be paying the award out of public funds. We see no reason to allow individual attorneys, no matter how important the rights they have vindicated, to receive unearned personal gain at the public expense.

This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time constraint, or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon sucess. An attorney's regular hourly billing is based upon an expectation of payment, win, lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all. Some cases under the civil rights statutes, those in which the facts are strong and the law clear, pose little risk of losing, and the attorney's normal billing rate will be adequate compensation. Others, in developing areas of law or where the facts are strongly disputed, will require a substantial upward adjustment to compensate for the risk. We also note that in a long and complicated lawsuit such as this one, only a portion of the time expended can be reasonable regarded as contingent; once liability is established the attorney is assured of compensation for establishing the appropriate remedy, monitoring the decree, and recovering his fee. The contingency factor is not a "bonus" but is part of the reasonable compensation to which a prevailing party's attorney is entitled under 1988.

The dissent argues that "it is not proper to treat the allowance of plaintiff's attorneys fees in such cases on a contingency fees basis since, with rare exceptions, the plaintiffs have prevailed in practically every school desegregation case which they have instituted." It is accurate to state that history now establishes that the plaintiffs have prevailed in virtually all past desegregation cases, and for sake of argument, that future plaintiffs may similarly be virtually assured in advance of success. However, that situation did not prevail during the early days of the present litigation, when most of the services at issue were performed. In holding that the contingency of compensation is a proper factor for consideration in determining reasonable payment for those services, we of course do not lay down a standard for guidance in situations where the fact of payment has never been in doubt.

iii **Costs & expenses:** The plaintiffs have also challenged the district court's award of statutory costs and out-of-pocket expenses. the district court did not explain its award of costs, but simply itemized those costs which it was granting. It excluded all pre-1971 costs, apparently assuming that if attorney's fees were not recoverable, neither were costs. Fed. R. Civ. P. 54(d) has long provided, however, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Plaintiffs in this case are the prevailing party. and we can see no reason to deny them their cost. The district court was in error in fixing 1971 as the cutoff date for the award of the costs.

Because of these errors, the entire award of costs and expenses must be recalculated. The plaintiffs have also challenged the award made for costs after 1971, however. The district court denied over $11,500 in costs, again without any explanation as to its reasons, and we thus must remand for adequate findings of fact and

conclusions of law. However, it eliminated costs in four major categories, providing some basis for review so that we may provide guidance for the district court on remand. Those four categories were expert witness fees, transcript costs, counsels' travel expenses and photocopying.

There are two separate sources of authority to award out-of-pocket expenses. Some expenses are included in the concept of attorney's fees, as "incidental and necessary expenses incurred in furnishing effective and competent representation," and thus are authorized by section 1988. *See* remarks of Congressman Drinan, 122 Cong. Rec. H12160 (daily ed. 1 Oct. 1976), *Beazer* v. *New York City Transit Authority,* 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds,* —— U.S. ——, 99 S. Ct. 1355 (1979). The authority granted in section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988.

Other costs are on a different footing. These include those costs incurred by a party to be paid to a third party, not the attorney for the case, which cannot reasonably be considered to be attorney's fees. *See Wheeler* v. *Durham Bd. of Educ.,* 585 F.2d 618 (4th Cir. 1978). These include, among others, docket fees, investigation expenses, deposition expenses, witness expenses, and the costs of charts and maps. Most of these expenses have long been recoverable, in the court's discretion as costs, pursuant to 28 U.S.C. § 1920, which provides:

> § 1920. Taxation of costs
>
> A judge or clerk of any court of the United States *may* tax as costs the following:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket-fees under section 1923 of this title.

Rule 39(e), Fed.R.App.P. also provides for the taxing of similar costs incurred on appeal, and there are other statutes and rules which may be relevant in a particular case.

The standards for the awarding of such taxable costs are well-settled and need not be repeated here. Suffice it to re-emphasize that the authorization for the allowance of such costs is not related to the separate authorization for attorney's fees provided in section 1988. We have a mandate from Congress that 1988 is to be liberally construed to achieve the public purpose underlying the Act, *Seals* v. *Quarterly County Court, supra,* 562 F.2d at 393, and we will therefore closely review an award of attorney's fees under that section in order to assure that its purpose is fulfilled. However, the plaintiffs are in the same posture as the prevailing party in any other case with regard to costs which are not part of attorneys' fees. The award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary, and the appellate courts will not normally interfere with the exercise of that discretion. *Fey* v. *Walston & Co.,* 493 F.2d 1036 (7th Cir. 1974). It would be advisable for litigants to obtain authorization from the

district court before incurring large items of expense; though, of course, failure to do so does not bar reimbursement if the trial court should decide that the expenditures were nevertheless reasonable and necessary.

V. THE 1978 FEE AWARD

Because there has not been an adequate evidentiary hearing relating to the pre-1971 services and expenses, the 1977 award must be remanded for further proceedings, resolution of the question whether the 1966 judgment barred a later award of fees, and a complete recalculation in accordance with this opinion. Among other factors, the district court will be required to consider whether the inflation of the intervening years must be taken into account, or whether the lower rate which prevailed for services at the time they were rendered has been balanced by the long delay which will reduce the purchasing power of the award's dollars in the present marketplace. With regard to the 1978 award, we have a complete record and conclude that the interests of justice will be served, in light of the long delay in this case, by our recalculation of an appropriate award of fees and expenses for that period. *See Weisenberger, supra,* 593 F.2d at 54.

Before entering into a discussion of the amount of the fees to be awarded, and laying aside for the moment challenges which have been made concerning such issues as duplication of services, we first observe that with one possible exception there can be no question concerning the essential nature of the services at issue. The possible exception involves the award of attorney's fees against the City of Memphis for services rendered in an action against the city. As the district judge observed in his opinion, that action was "based upon the conduct of the

Mayor or a majority of the members of the Council of the City of Memphis or both." District Judge McRae then went on to observe, "These matters required the Board [of Education of the Memphis City Schools] *and the plaintiffs* to seek injunctive relief in this cause against conduct that was designed to interfere with the desegregation plan ordered by this Court in accordance with the direction and rulings of the appellate courts." (Emphasis supplied.) This finding of fact is fully supported by the record and disposes of any suggestion that the services on this account were not essential, and Judge McRae subsequently commented, "[T]he attorneys for the plaintiffs did participate." Thus their entitlement to fees on this account is clearly demonstrated.

We have already established the fact that the plaintiffs are the prevailing party in this lawsuit; the Memphis schools are desegregated and the defendants did not succeed in their attempt to modify the plan in ways which would benefit white students at the expense of black students.

A. **Reasonable Hours of Service:** The attorneys for the plaintiffs have documented a total of 271.25 hours of service related to the five-day trial held in 1977. The district court disapproved, without specific findings, but apparently on grounds of unnecessary duplication of service, 74 hours. Not only is this cut unsupported in the record, but we conclude that it was clearly excessive given the facts of this case. Rather than attempt to pick out which hours of service were unnecessarily duplicative given the use of three attorneys, we elect to simply use a 5% reduction factor. There were only three attorneys involved in this aspect of the case, and a perusal of the hours billed demonstrates that there was little overlapping of service. Therefore the 10% reduction

factor which we employed in *Weisenberger, supra,* 593 F.2d at 54 n. 12, and approved in *Oliver,* 576 F.2d 714, would be excessive in this case. We have already held that it was improper for the district court to reduce compensation because the plaintiffs did not prevail on "parts of issues." We can see no reason to further reduce the hours of documented service provided by counsel for the plaintiffs, and defendants suggest none.

B. **A Reasonable Hourly Rate:** The attorneys for the plaintiffs have submitted their normal billing rates in affidavit form. Mr. Lucas normally charges $125 per hour for comparable "federal litigation," Mr. Noel charges $60 per hour, and Mr. Fields charges $40 per hour. These differences reflect the differences in experience among the attorneys.

The rates attested to were accepted by the district court and are not here challenged by the defendants, with the exception of Mr. Lucas's fee, which was cut to $75 per hour, apparently because it had awarded Mr. Lucas only $60 per hour the year before in connection with the 1977 award. We express no opinion as to the accuracy of the fee per hour awarded in the 1977 award, but do agree that Mr. Lucas's billing rate for "federal litigation" is high for office services. However, it is reasonable and supported both by the record and our own experience with fees charged by lawyers of his experience and legal stature for trial services. We therefore will calculate Mr. Lucas's fee under a bifurcated scale, using as base figures $125 per hour for trial work and the $75 per hour which the district court found to be reasonable for office services. No challenge is raised to the hourly fee granted by the district court for the services of Mr. Noel and Mr. Fields, except to the extent that the district court failed to adjust their normal hourly rate upward to account for the contingency nature of the fee.

The hearings here involved were collateral to and distinct from the desegregation suit itself, which had been finally terminated in 1974, so had the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether. Therefore, there was a real element of contingency as to whether the attorneys would be compensated for their services at all. The contingency element, on the other hand, is somewhat reduced both by the admittedly small but assured financial support received from the Legal Defense Fund and by the fact that the School Board here was seeking to alter a final judgment of the district court which had been arrived at only after many years of bitter litigation. Given that the burden was on the Board, we do not believe that there was a very large chance that the plaintiffs would wholly fail to prevent. An upward adjustment of 10% in the regular billing rates would, we believe, serve the Congressional purpose of awarding sufficient compensation to attract competent counsel.

Therefore, Mr. Lucas will be awarded $137.50 per hour for his trial work, and $82.50 per hour for his in-office work. Mr. Noel will be compensated at a rate of $66 per hour for the time he devoted to this cause, and Mr. Fields will receive $44 per hour. The total compensation we award to the attorneys in this case is set out in chart form below:

Mr. Lucas:	32	hrs.	(trial time)
	less 1.6	hrs.	(5% duplication reduction)
	30.4	hrs.	
	x 137.50		(reasonable hourly rate)
	$4,180.00		
	29.5	hrs.	(office time)
	less 1.5	hrs.	(5% duplication reduction)
	28	hrs.	
	x 82.50	hrs.	(reasonable hourly rate)
	$2,310.00		

Mr. Noel:	81.75	hrs.	
	less 4.09	hrs.	(5% duplication reduction)
	77.66	hrs.	
	x 66.00		(reasonable hourly rate)
	$5,125.56		
Mr. Fields:	128	hrs.	
	less 6.4	hrs.	(5% duplication reduction)
	121.6	hrs.	
	x 44.00		(reasonable hourly rate)
	$5,544.00		

C. **Costs and Out-of-Pocket Expenses:** In its ruling, the district court awarded the plaintiffs all of their expenses except that it cut the claimed expenses for an expert witness and for preparation of a student locator map by half, finding that these large expenses were incurred without prior approval of the court and were excessive. These items are recoverable, if at all, pursuant to the court's sound discretion under 28 U.S.C. § 1920. We will not disturb the conclusions of the district court on this matter.

The district court also reduced by half the duplicating expenses claimed by the plaintiffs' attorneys. These fees are recoverable under 42 U.S.C. § 1988 as a part of attorneys' fees, and are subject to closer review by this court. We believe that the plaintiffs have demonstrated that their duplicating expenses were reasonable in view of the large number of documents involved in this hearing. We are mindful of the frequent admonitions received by counsel in this Circuit, both from this Court and trial judges, to ensure that they are prepared with adequate numbers of copies of all relevant documents for the lawyers and judges involved, so that our time, which is far more valuable than the 10¢ a page that it costs to photocopy a document, is not wasted by unnecessary

delay. We do not believe that we should second-guess the attorney's decision that four copies (for their own use, the use of witnesses and for the court) was necessary in order to efficiently and competently try this case. The district judge allowed a total of $5,200.16 in costs and out-of-pocket expenses. We add $244.30 in additional reasonable copying expenses, for a total of $5,444.46.

VI. CONCLUSION

Many courts have used the "list of factors for consideration" approach first suggested by the Fifth Circuit in its oft-cited decision, *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and relied on by this court in *Monroe* v. *County Bd. of Educ.*, 505 F.2d 109 (6th Cir. 1974). The court in *Johnson* listed twelve factors which it held should be considered in determining reasonable attorney's fees:

1) the time and labor required;
2) the novelty and difficulty of the question;
3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation and ability of the attorneys;
10) the "undesirability" of the case;
11) the nature and length of the professional relationship with the client; and
12) awards in similar cases.

Id. 717-719. We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or indeed, how they are to be applied in a given case. We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "customary fee," and the "experience, reputation and ability of the attorney."Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts.

The 1977 Award is remanded to the district court for any necessary evidentiary proceedings, a resolution of the legal issue concerning the finality of the 1966 ruling, and a recalculation of attorneys' fees due to the plaintiffs for services rendered to them up until the final desegregation order was entered in 1974. The 1978 Award is remanded with instructions to the district court to enter judgment for plaintiffs in the amount of $22,604.02 to compensate them for services rendered by their attorneys and expenses incurred in 1977. the plaintiffs' attorneys are

also entitled to be compensated for their time spent litigating this issue and pursuing this appeal, and we remand this case to the district court for a proper determination of a reasonable fee for those services.

WEICK, Circuit Judge, concurring and dissenting in part:

The issues in these appeals are very important. Whatever we establish as the law of this circuit may control or have a bearing on the allowance of attorneys fees, costs and expenses in a multitude of ohter school desegregation cases in Cleveland, Lorain, Akron, Youngstown, Columbus, Dayton, Cincinnati, Louisville and elsewhere.

In the present appeals, the plaintiff's final motion was for the allowance of $988,870.73 for attorneys fees in which plaintiffs not only sought to recover what they claimed was the reasonable value of the legal services which were rendered but they multiplied the total value of such services by a factor of 2.5 as a bonus or incentive. We had previously disaproved of such a multiplier as unauthorized in *Oliver* v. *Kalamazoo Board of Education*, 576 F. 2d 714 (6th Cir. 1978) where in a small school desegregation case involving about 17,000 school children the District Judge allowed $507,067 in attorneys fees plus $15,000 for volunteered paralegal services rendered by one of the plaintiffs.

It seems that in these cases it has not even been considered that the funds out of which the allowance are to be paid have been exacted from local taxpayers for the needed and ever increasing expenses of the operation of the public schools. The primary purpose of the public schools is for the education of children by school teachers.

In my opinion, it is not proper to treat the allowance of plaintiff's attorneys fees in such cases on a contingency fees basis since, with rare exceptions, the plaintiffs have prevailed in practically every school desegregation case which they instituted. School desegregation cases are not the type of cases where plaintiff's lawyers should reap a

huge harvest. Nor should it be necessary for the plaintiffs in each case to be represented by a flock of lawyers. We should remember the old adage that too many cooks spoil the soup. It ought to be sufficient to have only local attorneys skilled in trying such cases and it ought not be necessary to have additional non-resident attorneys. Where there are a number of lawyers handling a case for the plaintiffs, there is always the problem of duplication of the work. In such a case the trial judge who is familiar with the case may properly take this into account in the allowance of fees and appellate courts ought not to interfere. the trial judge also is in the best position to evaluate the reasonable time necessary for the lawyers to perform their duties and also the reasonable value of their services. The factual findings of the District Court in these matters in the present cases ought not to be disturbed as they are not clearly erroneous. An allowance of $135.00 or more an hour for trial work in these cases is grossly excessive and it should never be allowed for mere office work performed by trial lawyers or their staffs or for time spent on the telephone or in traveling. Also any compensation received by a lawyer from a client should be credited on the fee bill which he applies to the court for allowance.

It must also be remembered that where the Board of Education is sued in a school desegregation case, it is entitled to due process of law and has every right to defend itself with its counsel like any other litigant. Ever since *Brown* was decided, the law has been developing and even now is not too clear as appears from separate opinions of the Justices of the Supreme Court recently in the Columbus and Dayton school cases.

Board of Education in school desegregation cases are subjected to the expense of not only compensating their own lawyers for legal services and expenses rendered over

a period of many years, but also in addition they are required to compensate the attorneys for the successful plaintiffs who have sued them to desegregate the schools. The plaintiff's attorneys in such cases are assessed against the Board under the Emergency School Aid Act, 20 U.S.C. § 1617, and the Civil Rights Attorney's Fees Awards Act of 1976. 42 U.S.C. § 1988. Thus the Boards of Education have double legal expenses in practically all cases.

A school desegergation case ought not to be treated as a receivership of the public school system. *Cf. State, Ex Rel. National City Bank* v. *Bd. of Education,* 52 Ohio St. 2d 81 (1977), citing in a footnote on pages 88, 89, *National City Bank and The Cleveland Trust Co.* v. *Battisti, Chief Judge,* Civil No. 77-3532 (C. A. 6, November 10, 1977).

The trial judge in the present case in his 1977 Fee Award which totaled $28,600 computed the allowance of the Memphis head counsel Lucas on the basis of $60.00 and hour, $40.00 an hour for some of Attorney Caldwell's services and $60.00 an hour for the remainder. Part of the legal services were performed many years ago before any of the enabling Acts were passed. He denied compensation to Norman Chachkin, New York attorney for NAACP Legal Defense Fund on the ground it was not shown that his services were necessary, in addition to the services of the Memphis trial lawyers. It does not appear that in so doin the District Court was clearly erroneous or abused its discretion.

In my opinion, the District Court was not obligated to allow compensation to any attorney for all the services which the attorney claimed to have rendered. The trial court familiar with the case could certainly take into account whether all of such services were reasonably necessary and whether the attorney prevailed wholly or in

part. In my judgment, the factual findings of the district Court in making the awards were supported by substantial evidence and are not clearly erroneous. There was no abuse of discretion.

In my opinion, however, the District Court did err in allowing compensation to plaintiff's counsel for volunteered legal services rendered in three suits by the Board against the City of Memphis for alleged interference with desegregation orders of the court which led to the granting of an injunction by the District Court against the City and appeals to the court. The plaintiffs attorneys had filed a motion in the cases and supported the Board.

There was no claim made that the attorneys for the board were incompetent or did not effectively represent their client in the three suits against the City of Memphis. The activity of the plaintiff's counsel in these cases was wholly voluntary and yet award was made against the City for $6,930 not only for services rendered against the City but also for services rendered to secure their award of compensation.

I do not believe it is wrong for us to be conservative in the allowance of attorney's fees to be paid from public funds.

Ruling of the United States District Court for the Western District of Tennessee Western Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEBORAH NORTHCROSS, ET AL., *Plaintiffs,* v. BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL., *Defendants* and CITY OF MEMPHIS, ET AL., *Added Defendants.*	No. C-3931

RULING ON THE APPLICATION OF THE PLAINTIFFS FOR ATTORNEYS FEES

This ruling pertains to the application of the plaintiffs for attorneys fees as part of the costs in this class action suit filed in 1960 to require the defendant Board of Education to desegregate the schools in Memphis, Tennessee. The application was made by a motion filed August 8, 1974. After considerable delay in the preparation for and the setting of oral hearing, the matter was heard and taken under advisement in the latter part of 1975. The plaintiffs seek relief pursuant to 20 U.S.C. § 1617, which provides that a district court has discretion to allow attorneys fees as part of the costs in school desegregation cases when certain conditions exist. This statutory authority became effective July 1, 1972.

The plaintiffs had never previously sought attorneys fees in the district court from the Board of Education. They now seek application of 20 U.S.C. § 1617 against the Board of Education retroactive to the commencement of the suit in 1960.

The plaintiffs also seek an award of attorneys fees against the City of Memphis based upon portions of this case which pertained to the separate conduct of the Mayor and some members of the Council of the City of Memphis, wherein the implementation of the desegregation plan ordered by this Court was placed in jeopardy. All of this portion of the motion pertains to services of the attorneys for the plaintiffs rendered after the effective date of the statute.

Section 1617 of Title 20 of the United States Code provides in part as follows:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) . . . for discrimination on the basis of race, color, or national origin in violation of . . . the fourteenth amendment to the Constitution of the United States as [it pertains] to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

For the purpose of ruling upon the disputed issues in this phase of the case, the Court notes that, before Section 1617 may be applied in favor of the plaintiffs in the discretion of the Court, there must be (1) the entry of a final order, (2) a finding that the proceedings were necessary to bring about compliance, and (3) a

determination that the plaintiffs were the prevailing party.

This Court is of the opinion that the judgment entered pursuant to the Court's memorandum decision dated May 3, 1973 was a final order within the meaning of Section 1617 even though the Court retained jurisdiction and has had supplemental proceedings since that time. That ruling of this Court adopted Plan Z as a final desegregation plan and the Court of Appeals denied the plaintiffs' appeal which sought a remand for more desegregation. *Northcross* v. *Bd. of Ed. Memphis City Schools,* 489 F.2d 15 (C.A. 6 Dec. 4, 1973); *cert. denied,* 416 U.S. 962 (April 22, 1974).

Although the plaintiffs have sought relief far beyond the amount granted on many occasions in the various stages of this litigation, an examination of the entire history of this case clearly shows that these proceedings were necessary to obtain faculty and student desegregation in the public schools in Memphis, Tennessee.

Similarly, this court is of the opinion that the plaintiffs are the "prevailing party" within the meaning of Section 1617 of Title 20 of the United States Doce even though the plaintiffs have not always been granted the relief which they sought. In this regard this Court concludes that the assertions of the plaintiffs which were rejected and therefore which effectively prolonged or delayed the overall proceeding, are to be taken into account in the amount of attorneys fees to be awarded.

The Court having concluded that the conditions authorizing the award of attorneys fees exist in this case, the Court must next consider the extent or scope of the award. As previously indicated, the plaintiffs contend that they are entitled to attorneys fees retroactive to the commencement of the case in 1960, pursuant to 20 U.S.C.

§ 1617, which by its terms became effective July 1, 1972. The defendant Board of Education contends, *inter alia,* that if any fees are allowable they are not allowable for services rendered prior to July 1, 1972.

The plaintiffs rely upon *Bradley* v. *Richmond School Board,*416 U.S. 696 (May 1974) for their contention on retroactivity, primarily upon the statement of the Supreme court set forth on page 710 of volume 416 of the United States reports wherein the following was said:

> In *Northcross* v. *Board of Education of the Memphis City Schools,* 412 U.S. 427, 428 (1973), we held that under § "the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" We decide today a question left open in *Northcross,* namely, "whether § 718 authorizes an award of attorneys fees insofar as those expenses were incurred prior to the date that that section came into effect." *Id.,* at 429 n. 2.[1]

However, on the same page the Supreme Court noted that an appeal was pending in *Bradley* on the award of attorneys fees by the district court at the time that 20 U.S.C. § 1617 became effective and further specifically stated:

> . . . the question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

[1]The reference to a ruling pertaining to attorneys fees by the Supreme Court in this case (*Northcross*) concerns an original application for attorneys fees in the Court of Appeals for the Sixth Circuit, where this case was pending on July 1, 1972, upon an appeal on issues other than attorneys fees.

Prior to the *Bradley* case, appellate authority had held that 20 U.S.C. § 1617 was not applicable to services rendered prior to its effective date. *Johnson* v. *Combs,* 471 F.2d 84, 86-87 (C.A. 5, 1972). After *Bradley,* the courts have recognized the retroactive application. *Brewer* v. *School Bd. of Norfolk, Virginia,* 500 F.2d 1129 (C.A. 4, 1974); *Thompson* v. *Madison Cty. Bd. of Education,* 496 F.2d 682, 690 (C.A. 5, 1974). However, these cases had a disputed award for attorneys fees pending on the date that 20 U.S.C. § 1617 became effective, just as the *Bradley* case had. Therefore this Court concludes that the retroactive application of Section 1617 for attorneys services rendered prior to July 1, 1972 is limited to cases where the matter of an award for attorneys fees was pending under circumstances wherein it was subject to a direct appellate review. Because there was no application for an award of attorneys fees pending in this case in any court on July 1, 1972, the attorneys fees to be awarded based upon 20 U.S.C. § 1617 are to be those that were based upon services that were rendered after July 1, 1972.

As previously indicated, on July 1, 1972 this cause was pending in the Court of Appeals for the Sixth Circuit on the appeal of the plaintiffs. On August 29, 1972 the Court of Appeals affirmed the plan of desegregation ordered by this Court in April 1972. However, the Court of Appeals also remanded the case to this Court with "the additional instruction that it prepare a definite timetable providing for the establishment of a fully unitary school system in the minimum time required to devise and implement the necessary desegregation plan." 466 F.2d at page 895.

It was in this phase of this marathon case that the plaintiff first applied for attorneys fees. The application was made in the Court of Appeals after the August 29, 1972 ruling in a Petition to Rehear. It was the denial of

this application that prompted the ruling in the Supreme Court on the allowance of attorneys fees pursuant to 20 U.S.C. § 1617. *Northcross* v. *Bd. of Education of Memphis City Schools,* 412 U.S. 427 (1973). On the remand to the Court of Appeals that Court concluded that attorneys fees could not be awarded pursuant to 20 U.S.C. § 1617 because the application was not made timely in that Court. Unreported ruling of the Court of Appeals of August 16, 1973 in this case.

Although this Court has concluded that attorneys fees may be awarded in this case pursuant to 20 U.S.C. § 1617 only for services rendered after July 1, 1972, the present motion also raises the question of the allowance of fees under the applicable criteria prior to the effective date of 20 U.S.C. § 1617, namely the test of "obdurate obstinancy." *Monroe* v. *Bd. of Comn'rs of Jackson, Tenn.,* 453 F.2d 259, 263 (C.A. 6, Jan. 1972). This Court is of the opinion that counsel for the defendant Board of Education and a majority of the members of successive Boards of Education of the Memphis City Schools were obstinate and obdurate in refusing to recognize the law as expressed by the Supreme Court in *Swann* v. *Charlotte-Mecklenberg Bd. of Ed.,* 402 U.S. 1 (April 20, 1971) and other cases decided on the same date. Even though the defendant Board in this cause was allowed to file a brief of *amicus curiae* in the *Swann* case, 402 U.S. 5, and even though the Court of Appeals remanded this case to this Court "for prompt consideration in the light of *Swann* and *Davis,*" 444 F.2d 1181 (June 1971), the defendant Board in the November 1971 and March 1972 proceedings in this Court persisted in its refusal to involuntarily assign pupils to schools pursuant to a plan which would overcome the effective dual systems resulting from discrimination against Negroes. *Northcross* v. *Bd. of Ed. Memphis City Schools,* 341

F.Supp 583, 588-89, (W.D. Tenn. April 20, 1972). This was manifested in various ways, but it was particularly manifested by the plans of desegregation that were proposed by a majority of the Board and even more so by the plans that were not proposed. In footnote 3 on page 587 of 341 Federal Supplement this Court noted that the post-hearing contention of the defendant Board suggested a lack of good faith.

Similarly in the opinion of the Court of Appeals which considered this Court's April 1972 ruling, the Court noted that the position taken by the defendant Board on the transportation of pupils was the opposite of the conclusion of the Supreme Court set forth in its unanimous decision in *Swann.* 466 F.2d at page 894.

This failure to recognize the ruling of the Supreme Court is analagous to the obdurate obstinance practiced by the Board of Commissioners in Jackson, Tennessee. In *Monroe* v. *Bd. of Comn'rs. of Jackson, Tenn., supra* at page 263, the Court of Appeals affirmed an award of attorneys fees because the defendant Board resubmitted a free transfer plan after the Supreme Court had stated clearly that free transfers in the Jackson system were unconstitutional.

Therefore this Court concludes that there should be an award to the plaintiffs for attorneys fees and expenses that were necessary to establish the rights of the plaintiffs to a desegregation plan of education due to the obstinance of the Board of Education and its counsel, by failing to recognize and take into account the holding of the *Swann* case and others decided by the Supreme Court on the same day.

This Court concludes that there should not be an award of attorneys fees to the plaintiffs under the obdurate obstinancy test for any services rendered prior to July 1, 1972 other than those mentioned above. While

it is correct that the denial of *certiorari* by the Supreme Court in April 1974 was the culmination of proceedings which were initiated in August 1968 when there was filed in behalf of the plaintiffs a Motion for Further Relief, the successive proceedings and remands reflect that the plaintiffs, the defendants, this Court and the Court of Appeals at various times made assertions, statements, or holdings which were not consistent with the relief ultimately approved. During this period the defendant Board was not contemptuous of the specific orders of this or any other court; however, it did not act willingly or voluntarily in the matter of eliminating the dual school systems by implementing effective faculty and student plans of desegregation. From the commencement of the case in 1960, including the proceedings on the Motion for Further Relief started in 1968, the parties, this Court, and the Court of Appeals were struggling with "a multitude and variety of problems under the (Supreme) Court's general directive." In the area of evolving remedies, we lower courts "had to improvise and experiment with detailed or specific guidelines." We "had to grapple with the flinty, untractable realities of day-to-day implementation of the constitutional principles" announced in *Brown I* in 1954. Our "efforts, of necessity, embraced a process of trial and error." The above partially quoted and paraphrased statements are from a preliminary statement in the *Swann* opinion. 402 U.S. 6. Therefore, this Court does not conclude that the actions of the defendant during that period were obdurate and obstinate as those terms were used as a basis, for the award of attorneys fees in school desegregation cases prior to the effective date of 20 U.S.C. § 1617.

This Court is of the opinion that the same reasoning applies even if this Court is in error in its conclusion that the retroactive application of 20 U.S.C. § 1617 is limited

to awards for attorneys fees which were pending subject to direct review on the effective date of the statute. As previously indicated, the Supreme Court has interpreted 20 U.S.C. § 1617 to include a condition that the award would not be made pursuant to that section if circumstances would render the award unjust. *Northcross* v. *Bd. of Education Memphis City Schools, supra* at 412 U.S. 428. This Court is of the opinion that the lack of specific guidelines and the resulting trial and error experimentation, coupled with the fact that the plaintiff never applied for any attorneys fees prior to the latter part of 1972, are circumstances which would make a retroactive award unjust.

In summarizing, the Court hereby rules that the plaintiffs are entitled to an award based upon attorneys fees and expenses which were incurred after July 1, 1972 and which were necessary to the relief ultimately granted and made final in 1974. Similarly the plaintiffs are entitled to an award based upon attorneys fees and expenses incurred due to the obstinance of a majority of the Board and its attorney in their refusal to recognize and act on accordingly, the holding in *Swann* v. *Charlotte-Mecklenberg Bd. of Education,* and the cases decided the same day, *supra.* This will require that the award will include some services and eliminate others in the same proceedings. While this may seem difficult, that is the nature of this case. In recent years there have been many difficult issues which have arisen in this case.

The Court expects the attorneys for the parties to confer and freely exchange information to the end that any or all issues on these questions which can be resolved by agreement will be resolved prior to scheduling a hearing for this purpose.

APPLICATION FOR ATTORNEYS FEES FROM THE CITY OF MEMPHIS

As indicated previously, the plaintiffs also seek an award of attorneys fees from the City of Memphis, based upon the conduct of the Mayor and Council of that separately chartered municipal corporation.[2]

The city government, the Mayor, and members of the Council were joined as defendants in the case after July 1, 1972. Therefore, there is no question of retroactivity of 20 U.S.C. § 1617 prior to its effective date on this phase of the application.

The record reflects that actions of the city officials were brought into the case with regard to three matters, all of which were based totally or in part upon attempts by the city officials to prevent the Board of Education from complying with the rulings of the United States Courts which were required to desegregate the schools in Memphis. These three matters were, (1) the attempted prohibition of the transportation of pupils, based upon a seldom applied local ordinance which required a certificate of convenience and necessity to be issued by city officials, (2) the refusal to pay to the Board of Education the sum of $250,000.00 because it was transporting pupils to school in accordance with this Court's orders, and (3) the threat to refuse to furnish gasoline to the buses leased by the Board of Education to transport pupils to schools as required by the orders of this Court and the appropriate appellate courts of the United States.

[2]The Board of Education of the City of Memphis was chartered separately from the City of Memphis. The members of the Board of Education are elected by the voters of Memphis, but funds for the operation of the schools are appropriated by the City Council and paid to the Board of Education officials by officials of the city government subject to the direction of the Mayor of Memphis.

After hearings on the pleadings and proof on all three of these matters this Court issued rulings granting injunctions against city officials or otherwise adverse to their contentions. After the ruling on the certificate of convenience and necessity question, the city attempted to obtain a stay or an expedited appeal in the Court of Appeals. After this was denied no further appeal was taken on this issue. Appeals were taken by the city on the issue pertaining to the $250,000.00 penalty imposed by the city on the Board of Education and a portion of the gasoline dispute. The Court of Appeals affirmed the holdings of this Court, found the appeals to be frivolous, and awarded attorneys fees to the Board of Education to be paid by the city in the total amount of $1000.00 for the appeals on both issues. *Northcross* v. *Bd. of Ed. of Memphis City Schools and City of Memphis, et al., Added Defendants,* 489 F.2d 18, 19 (C.A. 6, 1973). In those rulings the Court of Appeals affirmed this Court's finding "that the city was guilty of obstructionist tactics with intent to prevent integration of the schools," page 18, and that the city acted to prevent busing as a means of desegregation, which necessitates an order by restraining the "unlawful defiance" of this Court's order, page 20.

The award of attorneys fees by the Court of Appeals was based upon the authority of 20 U.S.C. § 1617 and Rule 38, Fed. R. App. P.

In this instant proceeding the city contends that the plaintiffs should not be awarded attorneys fees for any of the three matters referred to above because the disputes were between the city government and the Board of Education. The city argues that even though the rulings were adverse to it, they were in favor of the Board, therefore the plaintiffs were not the "prevailing party" as required by Section 1617 before fees may be awarded.

In this regard the Court notes that the unlawful actions taken or threatened by the city were directed toward or

imposed upon the Board of Education and in the proceedings the Board was the adversary against the city with the exception of part of the gasoline litigation. The Court also notes that in these proceedings, which were after this Court that Plan Z be implemented, there was no suggestion that the Board or its attorney was obstinate even though bus transportation had been ordered by this Court. It is correct that the Board was the primary instigator and aggressor in these disputes pertaining to the city. However, the plaintiffs acting through their attorneys joined in or supplemented the contentions of the Board and regularly participated in the proceedings. The Court finds that this overall participation by the plaintiffs was necessary for two reasons. First, the efforts of the city officials were an attempt to deprive the plaintiffs, the Negro students in the city schools, of their constitutional rights to effectively desegregated schools, and, second, the overall attitude and approach of the Board of Education of the Memphis City Schools since 1954 had hardly been one of willingness to see that the dual systems were effectively dismantled. Because the Negro students would have been the most seriously affected victims of the obstructionist tactics of the city officials, the plaintiffs certainly were prevailing parties in these disputes.

This Court concludes that the city government is liable pursuant to 20 U.S.C. § 1617 for attorneys fees and expenses which were necessary to bring about the final prevailing orders against the city officials in this cause. Furthermore, the Court concludes that the award of attorneys fees and expenses to the plaintiffs is also allowable upon the alternate grounds based upon the obdurate obstinance of the city officials and their bad faith toward the rights of the plaintiffs. *Monroe* v. *Bd. of Commissioners, Jackson, Tenn.,* 453 F.2d 259 (C.A. 6 1972).

The attorneys for the plaintiffs and the attorneys for the city government are directed to confer and attempt to agree on any and all issues contained in the overall question of what is the amount of money that should be awarded to the plaintiffs for necessary attorneys fees and expenses in the matters heretofore ruled upon in this cause against the City of Memphis and its officials. In the event that the total amount of the award cannot be agreed upon, the Court will determine the amount after a hearing devoted to that purpose or upon stipulated proof submitted to the Court.

Entered this 24th day of March, 1976.

ROBERT M. McRAE, JR. JUDGE
UNITED STATES DISTRICT COURT

Award of the United States District Court
for the Western District of Tennessee
Western Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEBORAH NORTHCORSS, ET AL.,
PLAINTIFFS,
Plaintiffs,

vs. No. C-3931

BOARD OF EDUCATION OF THE MEMPHIS
MEMPHIS CITY SCHOOLS, ET AL.,
Defendants,

and

CITY OF MEMPHIS, ET AL.,
Added Defendants.

AWARD ON APPLICATION OF THE PLAINTIFFS FOR ATTORNEYS FEES

This is a further ruling on the application of the plaintiffs for attorneys fees as part of the costs in this school desegregation suit which pertains to the public schools in Memphis, Tennessee. On March 24, 1976, this Court filed it Ruling on the Application of the Plaintiffs for Attorneys Fees. That decision set forth the periods and the criteria for the allowance of fees for the attorneys for the plaintiffs. The matter of the amounts to be awarded was not included in that former ruling. It was defferred until further proof and argument was presented.

Subsequent to that March 24, 1976, ruling, the plaintiffs sought permission to appeal this Court's ruling

upon an interim basis pursuant to 28 U.S.C. §1292(b), upon the grounds that this Court's ruling erroneously excluded additional time periods and criteria which should form the basis for an award for attorneys fees for the plaintiffs. The Court of Appeals denied the petition for permission to appeal.

Thereafter the plaintiffs filed in this Court a Motion for Partial reconsideration of the Court's ruling. Actually, this is a reargument of the earlier position taken by the plaintiffs supported by supplimental authorities. Essentially, it is the position of the plaintiffs that they are entitled to attorneys fees retroactive to the commencement of the suit in 1960.

Plaintiffs also filed a Supplement to Motion for Costs, which set forth the smount claimed as attorneys fees, which was a total claim of $1,017,724.86. Thereafter, an Amended Supplement to Motion for Cost was filed. This amendment deleted from the earlier claim the time devoted to this case by the then lawyers, Mr. Justice Thurgood Marshall and the Honorable Constance Baker Motley, United States District Judge for the Southern District of New York.

Subsequently, the plaintiffs filed an Amended Motion for An Award of Costs, which Amendment was for the purpose of relying upon the Civil Rights Attorneys Fees Awards Act of 1976, Public Law 94-559, which became effective October 19, 1976, as additional authority for the award of total attorneys fees. In addition to the above there was filed a Final Supplemental, Amended and Corrected Supplement to Motion for Costs, which seeks a total award of $988,870.73. In support of the above, numerous Affidavits have been filed by the attorneys for the plaintiffs, and in opposition thereto Affidavits have been filed in behalf of the defendant Board of Education and the added defendants, being certain elected officials of the City of Memphis.

This Court is of the opinion that its liability ruling on Application of the Plaintiffs for Attorneys Fees is still the applicable criteria for awarding fees to the attorneys for the plaintiffs. The Civil Rights Attorneys Fees Awards Act of 1976 does not alter this Court's liability ruling of April 24, 1976, because, as noted therein, the Judgement in the case had become final in 1974.

In its liability ruling this Court found that the defendant Board was liable for fees for necessary services wherein the plaintiffs prevailed after July 1, 1972, and for services required by the obstinance of a majority of the Board and its attorney in their refusal to recognize and act on, accordingly, the holding of *Swan* v. *Charlotte-Mecklenberg*, 402 U.S. 1 (1971). This applies in part to the November 1971 and March 1972 procedings.

November 1971 and March 1972 Hearings

The November 1971 hearing was a post *Swan* liability hearing. This Court is of the opinion that the obstinance of the Board and its attorneys was attributable to one half of this hearing and its preparation. The plaintiffs' attorneys whose aervices were required for this proceeding were Louis Lucas and William E. Caldwell. The necessary services were as follows:

	Lucas	Caldwell
Pre-trial Conferences	8 hours	8 hours
Trial Preparation	80 hours	212 hours
Trial	80 hours	88 hours
	168 hours	308 hours
One-half of total time	84 hours	154 hours

With regard to the hearing in the spring of 1972, the obstinance of the Board and their attorney again was attributable to one-half of the hearing.

	Lucas	Caldwell
Trial Preparation	62 hours	158 hours
Pre-trial Conferences		4 hours
Trial		76 hours
Trial brief		40 hours
	62 hours	278 hours
One-half of total time	31 hours	139 hours

Post July 1, 1972, Services

As the Court indicated in its liability ruling, the plaintiffs are entitled to attorneys fees after July 1, 1972, pursuant to 20 U.S.C. § 1617 to the extent that the services rendered were necessary and to the extent that plaintiffs were the prevailing parties.

As the Court also noted, the Court of Appeals remanded this case with an instruction to this Court to "prepare a definite timeable providing for the establishment of a fully unitary school system in the minimum time required to devise and implement the necessary desegregation plan." This required further proceedings which resulted in a final Judgment in accordance with this Court's Memorandum Decision filed May 3, 1973, which ruled upon a hearing which was conducted in April 1973. The plaintiffs sought much more transportation of pupils than the plan which the Court approved, therefore to a certain extent the plaintiffs did not prevail and the services rendered in furtherance of the plaintiffs' plan were not necessary. No services in furtherance of the appeal by the plaintiffs of this Court's May 3, 1973, ruling are included in the fees to be awarded, because the plaintiffs did not prevail in the appellate proceedings in the Court of Appeals and the Supreme Court.

This Court is of the opinion that one-half of the time devoted to this phase of the case by plaintiffs' attorneys is not assessable to the defendant Board, because the

plaintiffs' plan was rejected and therefore to that extent they did not prevail.

The services which form the basis for this portion of the award are as follows:

	Lucas	Caldwell
Conference in Chambers - 9/13/72	4 hours	4 hours
Hearing on Timetable - 9/22/72	8 hours	8 hours
Meeting with desegregation team - January 1973		8 hours
Preparation for Plan Z hearing in Feb., March and April 1973		152 hours
Conferences with Court 3/9/73 and 3/15/73		4 hours
Plan Z Hearing		32 hours
Post Trial Brief		20 hours
	12 hours	228 hours
One-half of the above times:	6 hours	114 hours

The Court received Affidavits filed by both sides reflecting widely divergent hourly rates for the time spent. This Court is of the opinion that the appropriate rate for the years involved is $60 per hour for Mr. Lucas and $40 for Mr. Caldwell in the November 1971 proceeding. In the March 1972 and the 1973 proceedings pertaining to the desegregation plan, Mr. Caldwell was lead counsel and therefore his fee should be based upon $60 per hour. This results in total fees in the amount as follows:

	Lucas
November 1971	
84hours @ $60.00	$5,040.00
March 1972	
31 hours @ $60.00	$1,860.00
Post July 1, 1972	
6 hours @ $60.00	$360.00
	$7,260.00

	Caldwell
November 1971	
154 hours @ $40.00	$6,160.00
March 1972	
139 hours @ $60.00	$8,430.00
Post July 1, 1972	
114 hours @ $60.00	$6,840.00
	$21,340.00

The attorneys for the plaintiff contend that their fees should be awarded on the basis of applying an adjustment factor whereby the hourly rate is multiplied by 2.5. Plaintiffs' attorneys contend that the nature of the case and other consequences of the representation authorize and require the adjustment. This Court disagrees and finds that the hourly rates as aprroved herein should not be adjusted.

The Court also finds that no fees are allowable against the defendant Board for the service of Norman Chachkin, the New York attorney for the NAACP Legal Defense Fund because there has been no showing that his services were necessary in addition to the services of local counsel. Therefore the total fees awarded in favor of the attorneys for the plaintiff and against the defendant Board of Education are $28,600.00.

Attorneys Fees For Plaintiffs
Against City of Memphis Government

As the Court noted in its liability ruling, there are three matters which authorize and require the award of attorneys fees against the City of Memphis based upon the conduct of the Mayor or a majority of the members of the Council of the City of Memphis or both. These matters required the Board and the plaintiffs to seek injunctive relief in this cause against conduct that was designed to interfere with the desegregation plan ordered by this Court in accordance with the direction and rulings

of the appellate courts. These matters are identified as (1) the transportation issue, (2) the $250,000 issue, and (3) the gasoline issue. As the Court has heretofore indicated, these matters were initiated by the defendant Board to prevent interference by city officials with the desegregation plan. However, the attorneys for the plaintiffs did participate and for the most part were supportive of the position of the defendant Board in these regards.

The transportation issue pertained to an attempt by city officials, primarily the Mayor, to require the transportation contractor of the defendant Board to obtain a certificate of convenience and necessity based upon a city ordinance that had never been applied in the then attempted manner. The records reflect that Mr. Lucas devoted twenty-four hours to this issue, including eight hours for a hearing on January 18, 1973. Mr. Caldwell's Affidavit reflects that he, too, devoted eight hours to the hearing on January 18, 1973. Due to the auxiliary nature of the role of the plaintiffs in that proceeding, this Court is of the opinion that there was not a necessity for both Messrs. Lucas and Caldwell to attend the January 18 hearing. Therefore, a fee should not be awarded Mr. Caldwell on this issue. A fee is awarded against the City of Memphis based upon twenty-four hours of service having been devoted to this issue by Mr. Lucas at $60 per hour for a total of $1,440.00.

The $250,00 issue pertained to a punitive measure imposed upon the defendant Board because it had transported pupils pursuant to desegregation Plan A of this Court. The Mayor and Council directed the appropriate officials to deduct $250,000 from the money appropriated for the general use of the Board. Two-hundred and fifty-thousand dollars ($250,000) was the approximate amount which the defendant Board had

spent up to that time for transporting students in furtherance of a desegregation plan.

The record reflects that Mr. Caldwell rendered forty-two hours of service on this issue. Fees at the rate of $60 per hour should be awarded for these services. This totals $2,520.00.

The gasoline issue pertained to the announced intention of the City officials not to aupply gasoline to the defendant Board for use of the transportation contractor who had arranged to transport pupils pursuant to the desegregation plan. This issue involved the novel problems, including coping with complex government regulation, which encountered by all users of gasoline in 1973. The Affidavits reflect that Mr. Lucas devoted thirty-five hours to this issue. Mr. Caldwell claims 30.5 hours on this issue. However, there is some duplication which the Court does not believe to be compensable for both attorneys. On July 20, 1973, Mr. Lucas claims eight hours for a hearing before Chief Judge Bailey Brown of this District, and Mr. Caldwell claims four hours for the same hearing. Therefore, the eight hours claimed by Mr. Lucas for that hearing are disallowed. Both attorneys claim a fee for a four-hour conference with the Court on August 18, 1973. The four hours claimed by Mr. Caldwell for this conference are disallowed because the duplicate services were not warranted in this matter wherein the attorneys for the plaintiffs served in an auxiliary capacity. On August 20, 1973, Mr. Lucas claims two hours for a conference with the Court. On the same date Mr. Caldwell claims four hours for a conference with the Court. Mr. Caldwell's four hours are disallowed. Therefore, there is allowed for the services of Mr. Lucas on this issue a total of twenty-seven hours at $60 per hour for a total of $1,620.00. There is allowed a total of 22.5 hours for the services of Mr. Caldwell at $60 per hour for a total of $1,350.00.

The total amount awarded for the services of Mr. Lucas against the City of Memphis is $3,060 and for the services of Mr. Caldwell there is awarded $3,870.00. The total for both attorneys is $6,930.00.

The proof also reflects that the attorneys for the plaintiffs claim fees for time devoted to a Supplemental Complaint filed in this cause. This was an alleged anti-trust cause of action in which the defendants were the Exxon Corporation, the Secretary of the Interior of the United States, and other United States officials and officials of the City of Memphis. This claim was never prosecuted, and the Court does not believe that the time devoted to that should be charged to the City of Memphis. This claim involves some time spent by Louis Lucas, William Caldwell and Elijah Noel, another lawyer in the same firm with Messrs. Lucas and Caldwell.

Out of Pocket Expenses

The Court hereby awards the plaintiffs as part of the costs against the defendant Board of Education a portion of the out of pocket expenses as reflected in Exhibit 2 of the Affidavit of William E. Caldwell and Norman J. Chachkin sworn to on September 20, 1976. The total expenses which are allowed against the defendant Board of Education are $8,007.31. They are itemized in the Appendix to the ruling.

The out of pocket expenses which are awarded against the City of Memphis are in the total amount $323.26. They are itemized in the Appendix to the ruling.

Summary

The ruling set forth above reflects the Court's conclusion on the application for attorneys fees and out

of pocket expenses in this cause through October 1976. Any matters included in the record prior to that date which are not specifically referred to herein are denied. This ruling does not cover the supplemental hearing in this calender year (1977), wherein the defendant Board sought to amend Plan Z under the guise of a plan for optional schools.

ENTER: This 4th day of November 1977.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

Ruling On 1977 Application

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEBORAH A. NORTHCROSS et al,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS,
Defendants.

RULING ON APPLICATION FOR ATTORNEYS FEES AND EXPENSES FOR MAY 1977 HEARING

This ruling pertains to the Plaintiffs' Claim for Additional Attorneys Fees and Expenses and the Motion for Award of Fees for Amicus Curiae, which were generated by the hearings in May 1977. That hearing pertained to four contested topics as set forth below:

(1) Cancellation and Modification of Pupil Assignment Zones

This pertains to an application by the Board to make 15 changes in the zones or boundaries of zones of the desegregation plan. The Court allowed two proposed boundary changes and rejected all others because they were found to be attempts to satisfy objections of white patrons at the expense of black students.

(2) Optional Schools

This was an attempt by the Board to amend the desegration plan by allowing free transfers at 18 "optional schools." The Court found the plan for most of the optional schools to be a hastily developed plan to

circumvent the desegration plan. The Court disallowed the application for 12 of the optional schools, and allowed the continuation of four which had been previously agreed upon by the attorneys for the parties and two newly-proposed legitimate optional programs.

(3) School Closing

The controversial item in this topic pertained to the Board's proposal to close Messick Junior-Senior High School. It was upon this issue that the Court allowed the Messick Action Council for Education to appear through counsel as *amicus curiae*. The Court concluded that the method used by the defendant Board and its staff to choose Messick School as the one school to close was inconsistent with the Board's duty to desegregate the school system. Therefore, this contested proposal of the Board was disallowed.

(4) Westwood Renovation

This issue pertained to the proposal of the Board's application for permission to make an estimated Two Million Dollar renovation to Westwood School, which will serve as a high school in the southwest part of the city. The plaintiffs through counsel objected to the renovation because the plaintiffs preferred that a new school be built instead of a renovation of an old one. The Court held that this issue was a matter entirely for the Board to decide. Therefore, the plaintiffs' objection to the renovation was denied.

At the end of its Memorandum Decision ruling on the above issues, the Court stated as follows:

> Counsel for the plaintiffs are directed to submit Affidavits reflecting the necessary time devoted to the issues on which the plaintiffs prevailed in this ruling so that the Court may consider an award of attorneys fees to be paid by the defendants to the attorneys for the plaintiffs as part of the costs, which are awarded against the defendants.

In response to this direction the attorneys for the plaintiffs have filed affidavits of time and expenses which are summarized on page three of their Memorandum in Support of Attorneys Fees and Out of Pocket Expenses as follows:

Elijah Noel, Jr.	69.75 hrs. x $60.00 per hour	$ 4,185.00
Louis R. Lucas	56.6 hrs. x $125.00 per hour	7,062.50
Richard B. Fields	132 hrs. x $40.00 per hour	5,280.00
Incentive Award of 100%		16,527.50
Out-Of-Pocket Expenses		7,788.96
	Total	$40,843.96

This Court is of the opinion that the amounts claimed should be reduced for various reasons.

As heretofore indicated the trial and preparation of this case involved a number of separate issues, some of which were decided in favor of the Board of Education. Also as heretofore indicated, one item covered in the 1977 hearing involved the Board's request for leave to renovate Westwood High School. This item was objected to by the plaintiffs, who took the position that the Board should be required to build a new high school. In its Memorandum Decision of May 24, 1977, the Court resolved the entire matter of Westwood construction in favor of the defendants. However, the plaintiffs have included the Westwood matters in their claim for a fee, as evidenced by the item of April 20, 1977, in Exhibit A to the Affidavit of Richard B. Fields, "April 20, 1977. Research on Westwood School, 2.0" hours. In addition to an adjustment for this specific

item, the Court is of the opinion that an adjustment should be made for the time devoted to parts of issues on which the plaintiffs did not prevail, such as school closings, boundary adjustments, and optional schools. In these other matters, the plaintiffs objected in toto to the Board's proposal on school closings, boundary adjustments, and optional schools. Two of the three school closings, two new optional school programs, the continuance of pre-existing optional school programs, the de-pairing of Sharpe-Cherokee and Snowden-Cypress boundary adjustments were approved over the plaintiffs' objections. The affidavits do not reflect any account being taken of these items on which the plaintiffs did not prevail.

The Court also finds that the rates claimed by the plaintiffs are excessive and therefore not within the criteria of "reasonable" as required for an award of fees by the Court. In its ruling in this cause of November 4, 1977, this Court awarded attorneys fees based on a rate of $60.00 per hour for lead counsel and $40.00 for assistant counsel for services rendered in the period from 1971 to 1973. This Court is of the opinion that the hourly rate for fees for these 1977 services should be $75 for Louis B. Loucas, $60 for Elijah Noel, Jr. and $40 for Richard B. Fields. The primary reason for the difference between the plaintiffs' attorneys exists by virtue of the length of experience of the attorneys in matters of this sort.

In its prior ruling in this case on attorneys fees the Court did not allow an incentive or multiplier award. The Court is of the opinion that an incentive or multiplier factor is not authorized or allowed for the services rendered in this phase of the case.

Another factor which this Court believes must be taken into account in the consideration of the amount of fees claimed by the attorneys for the plaintiffs is the

excess occasioned by the use of three attorneys. While it is true that all three attorneys for the plaintiff did not make a claim for the exact same services, the use of three attorneys caused the inclusion of some duplication of services which cannot pass the "necessary" test for an award of fees. The Court has undertaken to limit the necessary services for preparation and trial in this phase of the case and trial to not more than two attorneys. In this regard Mr. Lucas was considered a trial attorney, but some of his preparation time is disallowed.

After taking into account the above factors, this Court is of the opinion that the attorneys fees should be awarded on the basis of the items which are reflected on the Appendix attached hereto and incorporated herein and as adjusted as follows:

Louis Lucas — 45.5 hrs. @ $75.00 per hour	=	$ 3,412.50
Elijah Noel, Jr. — 49.75 hrs. @ $60.00 per hour	=	$ 2,985.00
Richard B. Fields — 102 hrs. @ $40.00 per hour	=	$ 4,080.00
Total	=	$10,477.50
Adjustment for time devoted to non-prevailing matter @ 20%	=	$ 2,095.50
Net Total	=	$ 8,382.00

Expenses

Exhibit B to the Affidavit of Richard B. Fields sets forth the claimed necessary out-of-pocket expenses in a total amount of $7,788.96. These include an item entitled "Services of William D. Lamson" which is itemized as follows:

Fee 37 days @ $100 per day	$3,700.00
Lodging and meals	$1,141.21
Art supplies, maps and other materials	$ 350.57
Air travel	$ 409.00
Automobile rental, taxi	$ 207.33
Total	$5,808.11

There is also included as an item: "Preparation of Private School Pupil Locator map by Students — 430 hours @ $2.30 per hour — $939.00."

William D. Lamson has assisted the plantiffs' attorneys previously in this case by making numerical studies and then preparing charts in support of the contentions of the plaintiffs. Also he has testified as a witness to explain his charts. The award of this Court filed in this cause on November 4, 1977, included some travel and subsistence expenses plus modest fees for Mr. Lamson.

This Court is of the opinion that the expenses incurred by the plaintiffs' attorneys for the services of Mr. Lamson and the students who prepared the "Private School Locator Map" without prior approval of the defendants or the Court were excessive. Similarly the court finds no justification for 4886 copies of material @ 10¢ per copy.

The Court therefore allows only one half of these specific items. Otherwise these claimed items of expense are allowed. This results in total items of out-of-pocket expenses in the amount of $5,200.16.

Attorneys Fees and Expenses of Amicus Curiae

On April 5, 1977, separate attorneys for the Messick Action Council for Education, Inc. filed a motion seeking permission to file an *amicus curiae* brief in the cause pertaining to the issue wherein the defendant Board sought permission to close Messick School. The Court allowed the appearance for limited participation

[1]The experience of this Court in this on-going school desegregation case has been that *amicus curiae* participants for special purposes are at a disadvantage due to the lack of familiarity with other significant phases of the case.

and invited counsel for the Messick Action Council to participate in pre-hearing conferences and otherwise be a limited participant in order that any *amicus curiae* participation might be as meaningful as possible.[1] The Court did not intend to allow or have a fully participating additional party plaintiff in the cause. During the trial, upon the application of the attorneys for the original plaintiffs, the Court did permit cousel for the Messick Action Council to participate in the interrogation of witnesses. The Court never intended for the *amicus curiae* to be awarded any costs including attorneys fees, and the Court hereby rules that no fees should be awarded to the attorneys for the *amicus curiae* participant Messick Action Counsel For Education, Inc.

This Court is of the opinion that it would not be in the best interests of furthering the proper handling of the present litigation to establish a precedent for compensation of interested individuals or groups who may wish to intervene in the action based on their interest in a single school or a single portion of the system. From time to time, interested groups and individual persons of the community have desired to intervene in this cause and some have been allowed to do so. However, usually their intervention has done little more than seek to reinforce positions already taken by one or the other of the principal sets of parties, and their presence has only tended to impede or complicate the litigation. Under these circumstances the Court believes that a precedent for compensating intervening parties should not be established by awarding fees for the participation of the *amicus curiae*.

Summary

The Clerk is hereby directed to enter a Judgement for the plaintiffs of costs in the amount of attorneys fees of

$8,382.00 and expenses of $5,200.16. A Judgment in favor of the defendants will be entered on the motion of Messick Action Counsel for Education Amicus Curiae for attorneys fees.

ENTER: This 7th day of July, 1978.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX TO RULING ON APPLICATION FOR ATTORNEYS FEES AND EXPENSES FOR MAY 1977 HEARING

Date	Description	Hours
	LOUIS LUCAS	
4-15-77	Conference in Chambers with Judge McRae	1.0
4-29-77	Conference with Richard Fields Re: Pre-Trial Memorandum	1.0
5-4-77	Trial Preparation	3.5
5-5-77	Trial	8.0
5-14-77	Trial Preparation	4.0
5-15-77	Trial Preparation	4.0
5-16-77	Trial	8.0
5-17-77	Trial	8.0
5-18-77	Trial	8.0
	Total:	45.5
	ELIJAH NOEL, JR.	
2-18-77	Meeting with J. C. Williams	2.0
3-20-77	Preparation of Response to Board's 3-2-77 Report and Motion	3.0
3-24-77	Meeting with John Wooldridge (Legal Assistant) Re: Plan Z Modifications	1.5
3-23-77	Meeting with Bill Lamson, Demographer	1.0
3-23-77	Meeting with Messick Action Counsel	2.0
3-24-77	Legal Research	1.0
3-31-77	Meeting with Panel of American Women Re: Magnet School	2.0
3-29-77	Supplemental Response to Board's 3-2-77 Motion	1.5
4-6-77	Meeting with Louis Lucas and Richard Fields at East Memphis Office	1.0
4-8-77	Conference call with Louis Lucas and Bill Lamson	.5
4-7-77	Research Re: Optional Schools	.25

Date	Description	Hours
4-19-77	Meeting with Ernest Kelly and Johnnie Watson Re: Optional Schools	2.0
4-21-77	Discussions Re: Private School Map (Ernest Kelly, Bill Lamson)	2.0
4-24-77	Meeting with Lamson and Fields for deposition of O. Z. Stephens	3.0
4-28-77	Meeting with Bruce Kramer and Williams	1.0
5-11-77	Meeting with Earnest Kelly and Johnnie Watson Re: Optional Schools	2.5
5-11-77	Meeting with Messick Action Council members and Bruce Kramer	2.5
5-15-77	Trial Preparation	7.0
5-19-77	Court Hearing	8.0
5-24-77	Review of Court's Ruling	1.0
	Total:	49.75

RICHARD B. FIELDS

2-8-77	Review Plan Z Modifications Proposal	1.0
2-18-77	Meeting with J. C. Williams, Chairman, Messick Action Council	2.0
3-8-77	Phone conversation with Bill Lann Lee	.5
3-9-77	Phone conversation with Bill Lann Lee	.5
3-14-77	Attendance at School Board Meeting Re: Messick closing	3.0
3-17-77	Review filings from defendants	.5
3-18-77	Meeting with Messick Action Council	1.0
3-23-77	Trip to School Board warehouse to locate exhibits	2.0
3-23-77	Meeting with Messick Action Council	2.0
3-24-77	Meeting with Maxine Smith, NAACP Executive Secretary	1.0
3-25-77	Search at Federal Court Clerk's Office for past exhibits	1.0
3-29-77	Hand deliver Request to Ernest Kelly, Conference	.5

Date	Description	Hours
3-30-77	Conference with Bill Lamson Re: Preparation of exhibits for Court	1.0
3-31-77	Meeting with representatives of Panel of American Women, Re: Optional Schools	2.0
4-6-77	Conference with Louis Lucas and Elijah Noel	1.0
4-7-77	Meeting with John Wooldridge of the Urban League, Re: Investigative Assistance	1.0
4-15-77	Conference in Chambers with Judge McRae	1.0
4-15-77	Conference with Bill Lamson	1.0
4-19-77	Conference with Bill Lamson, Re: Review of Plan Z Modification Post 1973	1.0
4-19-77	Conference with Ernest Kelly and Johnnie Watson, Re: Optional Schools	2.0
4-21-77	Meeting at Board of Education with Johnnie Watson	1.0
4-23-77	Review of School Closing Proposals	3.0
4-25-77	Deposition of O. Z. Stephens	3.0
4-28-77	Meeting with parents from Messick area	1.0
4-29-77	Conference with Louis Lucas on Pre-Trial Memorandum	1.0
4-30-77	Research for Pre-Trial Memorandum	1.0
5-2-77	Revision on Pre-Trial Memorandum	2.0
5-3-77	Preparation for Deposition of O. Z. Stephens	1.0
5-3-77	Deposition of O. Z. Stephens	3.0
5-4-77	Read Pre-Trial Memoranda	1.0
5-4-77	Trial Preparation	3.5
5-5-77	Trial	8.0
5-6-77	Conference with Bill Lamson	1.0
5-11-77	Conference with Ernest Kelly and Johnnie Watson on Optional Schools	2.5
5-11-77	Meeting with Messick Action Council Members and Bruce Kramer	2.5
5-12-77	Preparation of Optional Schools material, Conference with Ernest Kelly, Re: Board documents	1.5
5-12-77	Trial Preparation	2.0

Date	Description	Hours
5-13-77	Interview with Mrs. Frances Coe, Board member	1.5
5-13-77	Meeting with Messick witnesses	1.5
5-14-77	Trial Preparation	4.0
5-16-77	Trial	8.0
5-17-77	Trial	8.0
5-18-77	Trial	8.0
5-19-77	Trial	8.0
	Total:	102.0

Supreme Court, U.S.
FILED
MAY 13 1980
ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1629

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.

No. 79-1630

CITY OF MEMPHIS, et al.,

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1629

==========

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.

No. 79-1630

CITY OF MEMPHIS, et al.

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.,

==========

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Deborah A. Northcross, et al., plaintiffs below, respectfully request that the Court deny

the petitions for writs of certiorari filed by the Board of Education of the Memphis City Schools, et al. ["Board"], No. 79-1629, and the City of Memphis, et al. ["City"], No. 79-1630, seeking review of the Sixth Circuit's judgment and opinion reported at 611 F.2d 624 (23 Nov. 1979), Pet. App. 1-A to 35-A.[1/]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The judgment below disposed of consolidated appeals from two separate orders of the district court ruling on applications of plaintiffs in this longstanding school desegregation action for awards of costs, including reasonable attorneys' fees and out-of-pocket expenses. The principal appeal below, concerns the district court's 4 November 1977 "Award on Application of the Plaintiffs for Attorneys Fees" (Pet. App. 53-A [hereinafter, "first award"], granting in part and denying in part the request for fees and expenses from both the Board and the City covering the period from the commencement of the litigation through October 1976. The second appeal below,

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1/ "Pet. App." refers to the separately-presented appendix filed by the Board in No. 79-1629.

concerned the district court's 7 July 1978 "Ruling on Application for Attorneys Fees and Expenses for May 1977 Hearing" (Pet. App. 63-A) [hereinafter, "second award"], granting in part and denying in part the request for fees and expenses from the Board alone related to a five-day hearing held in May 1977. On appeal from the first award, the court of appeals remanded the case for further consideration in accordance with its opinion. Pet. App. 28A, 34-A. On appeal from the second award, the court of appeals remanded with instructions to enter for plaintiffs in an amount specified. Pet. App. 34-A.

The two sets of petitioners seek to present a wide variety of issues, numbering twelve in all, to this Court for decision. Many of the legal "questions" which they posit arise only as a result of petitioners' strained reading of the court of appeals' ruling: for example, the claim that the decision below withdraws all discretion from the district court on remand. Fairly construed, the ruling below presents two unexceptionable questions.

1. Whether the court of appeals erred in remanding the major part of the case (the first award) for entry of findings and conclusions which would enable intelligent review of any award?

2. Whether the court of appeals abused its discretion in determining the amount of fees on a small part of the case (the second award) presented for review on a complete and fully litigated record?

Statement

A detailed description of the proceedings in the district court and the court of appeals leading to entry of the judgments of which review is sought appears as an appendix to this Brief at pp. 1a-20a infra. The essential elements of this case are as follows:

From its commencement in 1960 until the present day, this suit has involved but a single claim for relief: the effective dismantling of the state-imposed dual school system in Memphis, Tennessee. After Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955), the board of education refused to plan for the education

of its black and white children together until forced to do so by court orders issued in this litigation. See, e.g., Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), cert. denied, 370 U.S. 944 (1962); id., 333 F.2d 661 (6th Cir. 1964).

A decade ago this Court summarily reversed a court of appeals decision and directed that prompt action be taken to complete the conversion of the Memphis public schools to a unitary system. Northcross v. Board of Educ., 397 U.S. 232 (1970). Subsequently, the case was again brought to this Court by the plaintiffs after the court of appeals denied a request for an award of attorneys' fees covering one appellate proceeding without "stat-[ing] reasons for the denial [making it] ... not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result." Northcross v. Board of Educ., 412 U.S. 427, 427-28 (1973)(per curiam).

Thereafter, the district court approved a "final" plan of desegregation for the system ("Plan Z"), the Sixth Circuit affirmed, and this Court denied review. Northcross v. Board of Educ., 489 F.2d 15 (6th Cir. 1973), cert. denied,

416 U.S. 962 (1974). At this first respite in what the court below correctly described as this continuous course of litigation, see Pet. App. 3-A, plaintiffs sought to obtain agreement on an appropriate award of attorneys' fees; and when negotiations proved unavailing, filed their motion for an award of costs including reasonable counsel fees -- which led ultimately to the judgments now under consideration.

The main subject of this litigation was far from quiescent, however. Mindful of this Court's admonition, Raney v. Board of Educ., 391 U.S. 443 (1968), the district court had retained jurisdiction over the case to insure that its decree was implemented and proved actually effective. Each year after it had approved a "final" desegregation plan, the district court was confronted with a request from the Board of Education to make a series of modifications to that plan. In the spring of the fourth year of Plan Z's operation, the district court concluded in an opinion issued 24 May 1977 that the Board had failed to establish a unitary school system and, in fact, had engaged in fresh, post-judgment acts of purposeful racial discrimination in the operation of the

public schools of Memphis. This determination was not appealed.

The current controversy stems from the district court's subsequent award of attorneys' fees to counsel for plaintiffs, who were "prevailing parties" with respect both to the main part of the case resulting in entry of the "final" plan of desegregation and also with respect to the post-judgment proceedings in 1977.

As set forth in greater detail in the appendix hereto, at pp. 5a-9a infra, the district court utterly failed -- despite the lesson of this Court's holding in Northcross v. Board of Educ., 412 U.S. 427 (1973) -- to explain the process by which it determined upon the services for which counsel would be compensated by an award of fees pursuant to § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 (1976), except that the services of certain counsel for the plaintiffs were regarded as completely unnecessary and not subject to any compensation. Nor did the trial court clarify the basis for the determination of the hourly rates at which time expended by counsel for the plaintiffs was to be compensated.

Plaintiffs appealed the adequacy of both fee awards made by the district court. After briefing and oral argument, the Sixth Circuit "conclude[d] that both orders granting attorneys' fees and expenses provide inadequate compensation, contain legal errors, and reach factual conclusions not supported by the record." Pet. App. 10-A. Since the record on the first award was not in a posture for final disposition (see note 4a infra), the court remanded the principal part of the case "for further proceedings in accordance with the standards set out in this opinion." Id. The record on the second award for the 1977 post-judgment proceedings was "adequate ... for us to independently assess an appropriate award, ... and we do so to demonstrate the findings and conclusions which we hold the district courts must enter in the record in making fee awards." Id.

The basic legal principles applied by the court below are as follows: (1) In accordance with this Court's ruling in Bradley v. School Bd. of Richmond, 416 U.S.696 (1974), both the Education Amendments of 1972, 20 U.S.C. § 1617 (1976) and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976) authorize an award

of fees in this litigation for services rendered prior to their enactment to pending cases such as the instant action. (2) Under the 1976 Act, plaintiffs who prevailed in this litigation are entitled to counsel fees covering all necessary services "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter," Pet App. 19-A, in reliance on express legislative history. S. REP No. 94-1011, 94th Cong., 2d Sess. 6 (29 June 1976). Further, "the hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action. ... Hours may be cut for duplication, padding or frivolous claims." Pet. App. 20-A. Since in its first award, the district court had "simply eliminated, without comment, hundreds of hours of documented service," the court remanded that part of the case "for entry of findings of fact and conclusions of law adequate to permit our review of the award." Pet. App. 19-A to 21-A. (3) In determining the appropriate rate of compensation, the "fair market value of the services provided" (Pet. App. 23-A) is the appropriate standard to implement the intent of Congress.

REASONS FOR DENYING THE WRITS

The court of appeals has written an eminently sensible opinion[2/] when confronted with a district court disposition that kept the appellate body "completely in the dark"[3/] as to the bases for decision, but which on its face was contrary to the will of Congress.[4/] The court of appeals did no more than establish a straightforward framework for determining awards of fees based initially on hours claimed and normal hourly rate

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2/ The petitions before the Court are devoid of citations to the opinions of the lower courts. Petitioners' sweeping characterizations of the actions of the courts below are not supported by an examination of what those courts actually did and said.

3/ Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974).

4/ Apparently the Sixth Circuit has frequently found itself in this situation. The court of appeals stated: "This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, making necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable." Pet. App. 20-A.

of counsel, with articulated adjustments upward or downward for such factors as contingency or duplication of effort. In this context, there is no merit to petitioners' complaint (Board Pet. 15) that the court of appeals has usurped the prerogatives of the district court.[5/] Plainly, it was not error to remand the major part of the case (the first award) for intelligible disposition, and it is noteworthy that at least as much remains to be decided in this case on these issues as has been decided to date, see pp. 12a-18a, infra. It is just as difficult to see how the court of appeals erred, with reference to a small aspect of this extensive litigation (the second award), by applying the standards it articulated for the benefit of the district judges in the Sixth Circuit, including this district court on remand. The determination of fees simply does not rise to

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5/ The second award was fully litigated in the district court and both plaintiffs and the Board appealed. The Board did so much as even suggest to either the district court or the court of appeals that a transcript of the five-day May 1977 hearing was necessary to proper disposition of any aspect of the fees dispute. The Board's current contention that such transcript is indispendable (Board Pet. 15) comes too late in the day; it attempts to inject an issue not litigated below in any fashion.

an abuse of discretion. Other circuits, some of them even in highly visible landmark decisions have attempted to deal with the details of fees determinations in a similar manner.[6/]

With respect to the decision of the court of appeals to remand the major part of the case, that decision is "not yet ripe for review by this Court," Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook R. Co., 389 U.S. 327 (1967), and the interlocutory nature of a decree is "a fact that of itself alone furnishe[s] sufficient ground for the denial of the application" for certiorari. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916).

Under the opinion below the district court retains ample discretion "to assure fundamental fairness to a defendant" (Board Pet. 12), which,

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6/ See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders, Inc. v. American Rad. & Stand. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (Grinnell I); Lindy II, 540 F.2d 102 (3d Cir. 1976) (en banc); Grinnell II, 560 F.2d 1093 (2d Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978).

we might add, appears here as a proven "violator of federal law." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978). Nevertheless "the [school desegregation] plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Id.[7/] In § 1988 Congress directed that prevailing school desegregation plaintiffs' lawyers should have their fees fixed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." See Pet. App. 12-A. Antitrust and similar commercial cases are legion in which lawyers comparably skilled and experienced to plaintiffs' chief trial counsel have been awarded much more than the base rate of $125/hr. which the court below, on a complete record,[8/] found reason-

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7/ The Senate considered, and rejected by a vote of 50-32, a proposed amendment of § 1988 that would have excluded school desegregation cases from the statute's coverage. 122 CONG. REC. S16451, S16457 (daily ed. 29 Sept. 1976); See also H.R. REP. NO. 94-12558, 94th Cong., 2d Sess. 4-5, 7 (15 Sept. 1976); 122 CONG. REC. H12159 (daily ed. 1 Oct. 1976) (remarks of Rep. Drinan).

8/ The reasonableness of the hourly rate claimed by plaintiffs' chief counsel was attested to by

able for court room work.[9/]

On the issue of compensating prevailing parties' counsel "for all time reasonably expended on the matter,"[10/] petitioners' asserted conflict

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8/ cont'd.

the affidavits of three prominent Memphis attorneys; the Board presented no countervailing evidence on this issue.

9/ Compare, e.g., Shapiro v. Consolidated Edison Co., CCH Fed. Sec. L. Rep. ¶ 196, 364 (S.D. N.Y. 1978); Frankenstein v. McCrory, 425 F. Supp. 762 (S.D.N.Y. 1977); Quirke v. Chessie Corp., 368 F. Supp. 558 (S.D.N.Y. 1974); Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974); TWA v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970); City of Philadelphia v. Chas. Pfizer Co., 345 F. Supp. 454 (S.D.N.Y. 1972); Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972); Oppenlander v. Standard Oil Co., 64 F.R.D. 597 (D. Colo. 1974); Hew Corp. v. Tandy Corp., 480 F. Supp. 758 (D. Mass. 1979).

10/ The court of appeals' standard is taken verbatim from S. REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (29 June 1976), which in turn quoted the holdings in Davis v. County of Los Angeles, 8 EPD ¶ 9444 (C.D. Calif. 1974), and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.C. Calif. 1974). In Stanford Daily, 64 F.R.D. at 684, at the page cited in the legislative history, the district court rejected the position taken by some federal courts, "that hours spent on the litigation of un-

among the circuits is considerably more imaginary than real. The two courts of appeals and four district courts which petitioners cite (Board Pet. 11-12; City Pet. 17-18) in fact are not in conflict with the ruling below.[11/] Moreover, the courts which have expressly considered the applicable legislative history are in complete agree-

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10/ cont'd.

successful claims should be deducted from the number of hours which an attorneys' fees award is computed." The Court held: "However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests. These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to devine the exact parameters of the courts' willingness to grant relief." This was (and is) the usual rule in non-civil rights cases. See, e.g., Locklin v. Day-Glo Color Corp, 429 F.2d 873 (7th Cir. 1970), cert. denied, 400 U.S. 1020 (1971); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970); McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978). See also, e.g., Palmer Rodgers, 10 EPD ¶ 10,499 (D. D.C. 1975); Walker v. Ralston Purina Co., 409 F. Supp. 101 (M.D. Ga. 1976); cf. United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978).

11/ The circuit decisions relied upon by petitioners are Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), and Schaeffer v. San Diego

ment with the Sixth Circuit.[12/] Congress did no more than adopt the general rule extant at the

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11/ cont'd.

Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (a pre-§ 1988 case construing Title VII). These decisions are wholly distinguishable from the instant case on the simple ground that they involved multiple claims for relief, on only one or a few of which plaintiffs prevailed, whereas this case involves a single claim for school desegregation on which plaintiffs entirely prevailed. The First Circuit has made it clear that it does not disagree with the Sixth Circuit's approach below. In Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979), the court cited and distinguished its earlier decision in Nadeau as follows:

> Also, it was not error to award fees for the time spent by counsel in an unsuccessful attempt to broaden the scope of remedies available under the decree. This issue was all part of and parcel of one matter -- counsel should not be penalized for every lost motion. This is not the same as a case where claims are truly fractionable. Cf. Nadeau v. Helgemor, 1 Cir., 1978, 581 F.2d 275.

The district court decisions relied upon by petitioners are similarly distinguishable as cases "where claims are truly fractionable."

12/ See, e.g., Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978); Donaldson v. O'Connor, 454 F. Supp. 311 (N.D. Fla. 1978).

time it passed § 1988 (see note 10, supra), and the Sixth Circuit did no more than adhere to clear congressional design and intent. "The statute calls for a reasonable fee, not a bargain-basement figure.[13/] The Sixth Circuit has left intact the traditional discretion of district courts in these matters; the court has simply recognized that "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co., v. Moody, 422 U.S. 405, 416 (1975).

Finally there is no validity to the Board's contention (Pet. 13-14) that the application of § 1988 and § 1617 to this continuously active case is inconsistent with this Court's decision in Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974).[14/] We have repeatedly challenged the Board

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13/ Cf. Pitchford Scientific Inst. Corp. v Pepi, Inc., 440 F. Supp. 1175, 1177 (W.D. Pa. 1977).

14/ Wheeler v. Durham City Bd. of Educ., 585 F.2d 618 (4th Cir. 1978), is not contrary. There the case had become dormant then the fee statute was passed, and there was no pending litigation over any issue. This case, in total contrast, was the subject of active, heated litigation when both applicable fee statutes were enacted. See Hutto v. Finney, 437 U.S. 678, 694-95 n.23 (1978).

to allege the prejudice and injustice necessary to fit the "manifest injustice" exception to the Bradley rule, but the Board has failed to respond and it does not respond here. Nowhere does the Board claim that if it had known of its potential statutory liability for fees, "rather than simply the common-law availability of an award, [such knowledge] would hve caused the Board to order its conduct so as to render this litigation unecessary and thereby preclude the incurring of such costs." Id at 721. To the contrary, the Board's effort to undermine the desegregation plan in the spring of 1977, well after the passage of both § 1617 and § 1988, demonstrates that knowledge of potential attorneys' fees liability had no impact on the conduct of this board of education. The court of appeals was manifestly correct in concluding that there is a complete absence of prejudice to the Board. Pet. App. 17-A.

This case does not merit review by this Court.

14/ cont'd.

There are probably more than 100 lower court decisions in accord with the Sixth Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Dated: 13 May, 1980

Respectfully submitted,

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Appendix

APPENDIX

The "long, complicated history of this bitterly contested school desegregation case" (Pet. App. 2-A) may be traced through the reported opinions of this Court (which has twice granted review), the Court of Appeals for the Sixth Circuit (ten reported decisions), and the district court (innumerable decisions and orders). See e.g., Board Pet. 2.[1a/] A "general description," sufficient "to give an understanding of the scope and quality of representation provided by the plaintiffs' attorneys in the course of the last two decades" (Pet. App. 2-A to 3-A), is set out in the opinion below. Pet. App. 3-A to 4-A.

The First Application and Award

Two weeks after this Court declined to review the final plan of desegregation ordered by the district court, 416 U.S. 962 (22 April 1974),

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1a/ A comprehensive summary of the history of this litigation takes up nearly 50 pages of our opening Brief for Plaintffs-Appellants, filed in the court below, 6th Cir Nos. 78-1289,-1290,-1291 (served 4 December 1978).

plaintiffs' counsel wrote counsel for the Board, initiating an effort to settle plaintiffs' claim for costs, including reasonable attorneys' fees and out-of-pocket expenses. When these efforts failed, plaintiffs filed a formal motion for such an award, against both the Board and the City on 1 August 1974. Protracted litigation over the fees issues then ensued.

The district court's 24 March 1976 "Ruling on the Application of Plaintiffs for Attorneys Fees" addressed plaintiffs entitlement to an award of fees. The court held: (1) that, as to the Board defendants, plaintiffs are the "prevailing party" and otherwise fulfilled the requirements of § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Pet. App. 42-A); (2) that § 1617, as construed in Bradley v. School Bd. of Richmond, supra, authorizes an award only for services rendered after the effective date of the statute, 1 July 1972, because (a) there was on that date no application for fees "pending under circumstances wherein it was subject to a direct appellate review" (Pet. App. 44-A) or (b) in the alternative, because under the standard enunciated by the law of this case, Northcross v. Board of Educ. of the Memphis City Schools, 412 U.S. 427 (1972), "the lack of specific guidelines and the resulting

trial and error experimentation [in school desegregation cases], coupled with the fact that the plaintiff never applied for any attorneys fees prior to the latter part of 1972, are circumstances which would make a retroactive award unjust" (Pet. App. 48-A); (3) that, additionally as to the Board defendants, plaintiffs are entitled to an award of fees for services rendered after the decisions in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (April 20, 1971), and companion cases, because the Board's litigation conduct in response to those decisions was "obstinate and obdurate" (Pet. App. 45-A to 46-A); and (4) that plaintiffs are entitled to recover fees as part of the costs to be assessed against the City defendants under both § 1617 and the "obstinate and obdurate" standard. Pet. App. 49-A to 51-A.

Thereafter, plaintiffs documented over 4,800 hours[2a/] of services rendered by plaintiffs' law-

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2a/ Nearly 4,000 hours were in connection with proceedings arising out of plaintiffs' 1968 Motion for Further Relief. The 1968 motion was filed pursuant to this Court's decision in Green v. County School Bd., 391 U.S. 430 (1968), and companion cases. In its 24 March 1976 ruling the

yers in litigation against the City. Plaintiffs also amended their application to include reliance on intervening legislation, the Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. § 1988. Plaintiffs supported their application with a detailed factual presentation: answers to interrogatories; a 14-page stipulation of facts pertaining to the City, along with an agreed 7-page pre-hearing order designating relevant parts of the record; nearly 100 pages of affidavits and supporting documentation from counsel for plaintiffs itemizing the necessary services rendered and litigation expenses incurred; of affidavits from three prominent Memphis attorneys familiar with the history of this case

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2a/ cont'd.

district court correctly observed that "the denial of certiorari by the Supreme Court in April 1974 was the culmination of proceedings which were initiated in August 1968 when there was filed on behalf of the plaintiffs a Motion for Further Relief..." Pet. App. 47-A. As the court of appeals described the intervening years: "For the next four and a half years, the case moved at a steady pace back and forth between the district court, this Court [of Appeals] and the Supreme Court, as one phase after another of an effective, comprehensive desegregation plan was hammered out. In 1973, a new twist was added when the City of Memphis attempted to block desegregation...." Pet. App. 3-a.

and with rates charged in the community for complex federal litigation; and of affidavits from out-of-town attorneys familiar with school desegregation litigation in general and with the importance and complexity of this case in particular. In response, the Board filed no affidavits or any other evidence,3a/ and the City filed two affidavits from Memphis lawyers, consisting of a total of three substantive sentences and not referring at all to federal court litigation. In addition, the district court held a hearing on 22 October 1976, resulting in a transcript of 109 pages.

On 4 November 1977 the district court filed this "Award on Application of the Plaintiffs for Attorneys Fees" (Pet. App. 53-A to 62-A), disposing of plaintiffs' claims as follows: (1) the court declined to reconsider its ruling that § 1617 does not authorize fees for services ren-

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3a/ By agreement, the Court was required to respond to plaintiffs' presentation only as it related to services rendered since the Swann decision in 1971. Pursuant to the court of appeals' remand, the Board will now have the opportunity, if it chooses, to respond to the itemizations relating to pre-1971 services.

dered prior to 1 July 1972, and also held 42 U.S.C. § 1988 to be inapplicable,[4a/] thereby denying recovery for about 2,084 hours of services (Pet. App. 55-A); (2) the court awarded $21,490 to two of plaintiffs' attorneys for one-half of 816 hours of services in connection with the Board's "obdurate and obstinate" conduct in the latter half of 1971 and the spring of 1972 (Pet. App. 55-A), and omitted altogether 347 hours of services of these two attorneys during this time frame without any discussion at all;[5a/] (3) the court awarded the same two lawyers $7,200 for one-half of 240 hours of services rendered after 1 July 1972 "because the plaintiffs' [proposed desegregation] plan was rejected and therefore to that extent they did not prevail" (Pet. App. 56-A to 57-A); and omitted, without discussion, 580 hours of services rendered by these attorneys during the same period, as well as 39 hours claimed by a third attorney;[6a/] (4) the court denied recovery of all hours claimed by plaintffs' New York cocounsel associated with the NAACP Legal Defense and Educational Fund, Inc., with the single statement that "there has been no showing that his services were necessary in addition to the services of local counsel" (Pet. App. 58-A)[7a/] (the claim is for 829 hours, of which 619 were in

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4a/ The court had earlier declined to award fees under § 1617 for pre-July 1972 services on the ground that that statute's applicability was "limited to cases where the matter of an award for attorneys fees was pending under circumstances wherein it was subject to a direct appellate review." Pet. App. 44-A. Although this condition was fulfilled by the 1976 amendment to 42 U.S.C. § 1988, passed while the question of fees was pending decision in the district court, the court refused to apply § 1988 on the new ground that "the Judgment in the case had become final in 1974." Pet. App. 55-A).

5a/ The Board appealed the district court's bad faith finding and the limited award of fees based on that finding. The court of appeals pretermitted decision of those issues with its holding that fees for services rendered since 1968 are authorized by statute. The Board has not renewed its position here.

6a/ The district court's award nowhere identifies or discusses the many hours of services which were excluded from compensation altogether. In 31 pages of appendices attached to our opening brief in the court of appeals (see note 1a, supra), we "attempted," in the words of the court of appeals, "largely by guesswork, to identify which hours of service ... were excluded from consideration." Pet. App. 21-A.

7a/ The court of appeals correctly noted that New York counsel "provided the plaintiffs with many hours of service which were not provided by anyone else, particularly in connection with this Court and the Supreme Court." 611 F.2d at 657.

time periods otherwise covered by the court's entitlement ruling); (5) the court awarded against the City $6,930 for over 115 hours of services (out of a claim for over 305 hours) (Pet. App. 58-A to 61-A)[8a/] and $343.26 in costs and expenses;[9a/] (6) the court evaluated the services of the two plaintiffs' lawyers who were allowed fees at a routine hourly rate of $60 per hour for "lead counsel" and $40 per hour for subordinate counsel (Pet. App. 57-A), but summarily declined (Pet. App. 58-A) to consider either the extraordinary circumstances urged by plaintiffs to warrant an upward adjustment in the base rate or the

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8a/ The district court identified the excluded 24 hours of services against the City on grounds of unnecessary duplication. Pet. App. 59-A and 60-A. These findings, the only specific facts found were not disturbed by the court of appeals, but are subject to reconsideration on remand.

9a/ The court, also without findings, awarded plaintiffs part ($8,007.31 of $19,548.77 expended) of their statutory costs and out-of-pocket expenses incurred in litigation against the Board from September 1971 through 1974 (Pet. App. 61-A), and denied, without mention, plaintiffs' claim for $12,619.95 in costs and expenses incurred prior to September 1971. Questions relating to statutory costs and litigation expenses were remanded for reconsideration by the court of appeals (Pet. App. 25-A to 28-A); none of these issues is presented for review here.

extreme inflation of the intervening years which had significantly devalued the 1971-73 rates.[10a/]

A judgment in conformity with this ruling was entered by the district court pursuant to FED. R. CIV. P. 54(b); plaintiffs appealed and both the Board and the City cross appealed.

The Second Application and Award

In the words of the court of appeals (Pet. App. 4-A):

> In the meantime, a new controversy had flared up, when the School Board sought substantial modification of Plan Z which

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10a/ Plaintiffs presented documentation to the district court showing that by 1976 the Board of Education lawyers over the years had been paid -- when their services were rendered, win, lose or draw -- the equivalent of over 350,000 1975 dollars to defend the dual system. Application of the Consumer Price Index increases since 1975 to the same figures (i.e., excluding fees paid by the Board since 1975) results in an amount equivalent to about 550,000 1980 dollars. These dollar figures relate only to attorneys' fees and reveal nothing about the untold worth of the endless hours devoted by the Board's superintendent and his staff to the defense of this litigation.

would have slowed down and undermined the progress of desegregation. A five-day trial was held in 1977, and the defendant's proposals were, for the most part, rejected by the court.

See also Pet. App. 63-A to 64-A. Pursuant to the district court's determination at the conclusion of its 24 May 1977 Memorandum that plaintiffs were the prevailing party entitled to attorneys' fees, plaintiffs documented 271.25 hours of necessary services related to the May 1977 hearing.[11a/]

On the question of amounts to be recovered, the district court entered its ruling on 7 July 1978 (Pet. App. 63-A), awarding $8,382.00 in fees and holding as follows: (1) the court awarded fees for 197.25 hours of the 271.25 hours of services rendered by plaintiffs' attorneys, disapproving, without identification or specific findings, 74 hours of claimed necessary services; (2) as to approved hours, the court (again, without specific findings) employed an across-the-board discount of 20% as "an adjustment [that]

11a/ Plaintiffs made no claim for services related to their separate contention that a new high school (rather than renovation of an existing school) should be built in the Westwood area, except for 2 hours which were inadvertently included in the affidavits and explicitly excluded by the district court. See Pet. App. 65-A to 66-A.

should be made for the time devoted to parts of issues on which the plaintiffs did not prevail" (Pet. App. 66-A);[12a/] (3) while approving the "normal hourly rates" claimed by plaintiffs' attorneys Noel and Fields ($60/hr. and $40/hr., respectively), the court reduced (to $75/hr.) as "excessive" (but without explanation) the base rate ($125/hr.) claimed by plaintiffs' chief trial lawyer Lucas (Pet. App. 66-a);[13a/] (4) the court rejected plaintifff' request for an upward adjustment of the award, stating its "opinion that an incentive or multiplier factor is not authorized or allowed for the services rendered in this

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12a/ For example, plaintiffs opposed the Board's modification and school closing plan in its entirety on the ground that the proposal as a whole was intentionally racially discriminatory, was arbitrary, and portended disruption of desegregated schools which appeared to be stabilized. The district judge agreed with these contentions and entered precise findings and conclusions to this effect, but in the process of separately analyzing each piece of the total package, he found a few proposals so innocuous as not to require disapproval. These are the sorts of "parts of issues" which the plaintiffs are presumed to have lost.

13a/ The rates for Noel and Fields have not been disputed, but the rate for Lucas was reviewed and revised by the court of appeals and the Board makes it an issue here. Board Pet. 15-16.

phase of the case." Pet. App. 66-a.[14a/]

The court of appeals consolidated cross appeals from the first and second awards for argument and decision.

The Decision of the Court of Appeals

In its decision of 23 November 1979, the Sixth Circuit "conclude[d] that both orders granting attorneys' fees and expenses provide inadequate compensation, contain legal errors, and reach factual conclusions not supported by the record." Pet. App. 10-A. Since the record on the first award was not in a posture for final disposition (see note 3a, supra), the court remanded the principal part of the case for further proceedings in accordance with the standards set out in this opinion." Id. The court determined, however, that the record on the second award was "adequate... for us to independently assess an appropriate award,... and we do so to demonstrate

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14a/ On the ground that they were "excessive" or without "justification," the court awarded only one-half of plaintiffs' expenses for expert-witness fees, preparation of a private-school pupil-locator map, and photocopying, thereby awarding $5,200.16 of the $7,788.96 expended by plaintiffs. Pet. App. 67-A to 68-A. The court of appeals sustained all aspects of this holding, except the disallowance of photocopying expenses (Pet. App. 32-A to 33-A), and none of these issues is presented for review.

the findings and conclusions which we hold the district courts must enter in the record in making fee awards." Id. The court said (id.):

> We understand that the findings of fact which are required to substantiate a court's exercise of its discretion in making a fee award are frequently very complicated. Nevertheless, both the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award. The plaintiffs are entitled to some explanation of the reasoning used to exclude those hours which were cut, and some description of the findings which were relied upon to find that expenses and billing rates were excessive. Any review of the court's awards in this case would require substantial amounts of sheer conjecture on our part, as we speculate as to reasons why the court might have cut certain documented hours. In fact, it is impossible to tell whether the district judgement might not have simply overlooked certain services provided by plaintffs' attorneys. Certainly no more substantial reason appeals in this record.

The court of appeals held, first, that 20 U.S.C. § 1617 and 42 U.S.C. § 1988, both enacted while this case was in active litigation, authorize fees for services rendered to plaintiffs since 1968.[15a/] The court elected to focus its decision

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15a/ Because of an unresolved dispute about the meaning of a 1966 order, after which the case was

on the application of § 1988 and its comprehensive legislative history. Pet. App. 11-A. On the basis of this Court's decision in Bradley v. School Bd. of Richmond, supra, and the explicit legislative history of § 1988 that the new statutory authorizations for attorneys' fees apply to all pending cases (cases in which "there was an active controversy ... at the time the Act became effective"), "unless special circumstances exist which would make an award manifestly unjust." Pet. App. 14-A. Applying that standard to this case, the court held that while "[c]ertain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair" (Pet. App. 16-A), there has been no such order since 1968 in this litigation. In response to the district court's reasons for denying application of the statute, the court held (Pet. App. 17-A and 18-A):

15a/ cont'd.

dormant until plaintiffs filed their Green motion in 1968 (see Pet. App. 3-A), the court of appeals remanded the question of entitlement to fees for pre-1968 services to the district court for further consideration. Pet. App. 17-A to 18-A. That issue is not before the Court.

However, we reject the notion that mere uncertainty in the law is a "special circumstance" justifying rejection of the statutory remedy. A major purpose of the Fees Awards Act was to encourage the bringing of suits in new and undeveloped areas of civil rights law, and it would be anomalous indeed if we were to deny fees for the very reason the statute was passed. Finally, the plaintiffs' delay in applying for fees (which was largely due to the fact that there was no earlier appropriate time to pause for litigation of the fee issue, at least not since 1966) is hardly grounds for denying fees. The defendants have failed to point to any prejudice or harmful effects on them as a result of the plaintiffs' delay. The prejudice, if any, has inured to plaintffs' attorneys who have provided years of service without compensation in hand. This is not a case where, years after a case has been finally disposed of, the prevailing party seeks to reopen the case to litigation of the fees issue. Cf United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968).

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However, from 1968 until shortly before the application for fees was made by the plaintiffs, the case was in continuous, active litigation. Not only was there no "final judgment" which could reasonably be said to settle the issue of fees during that period, but there was not time to raise the matter of fees at all.

Second, the Sixth Circuit held that in this single-claim school desegregation case in which the plaintiffs had "prevailed on the case as a whole" (Pet. App. 18-A) and "obtained the relief which they sought" (Pet. App. 19-A), the district court plainly erred "by deciminating the total hours claimed with arbitrary percentages" to account for "issues or parts of issues" on which plaintiffs had assertedly not prevailed. Pet. App. 18-A and 19-A. supra. The rule adopted, based on the legislative history of § 1988, is that all necessary services are to be compensated, "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." Pet. App. 19-A. "The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action.... Hours may be cut for duplication, padding or frivolous claims." Pet. App. 20-A. Since in its first award the district court had "simply eliminated, without comment, hundreds of hours of documented service," the court remanded that part of the case "for entry of findings of fact and conclusions of law adequate to permit our

review of the award." Pet. App.21-A.[16a/]

Finally, the court addressed the appropriate standard for determining a reasonable hourly rate, and concluded that the "fair market value of the services provided" (Pet. App. 23-A) is the appropriate standard to implement the intent of Congress. The court adhered to its earlier decision in Oliver v. Kalamazoo Bd. of Educ., 576 F.2d 714 (6th Cir. 1978), disallowing "a 'bonus' multiplier." Pet. App. 23-A. But the court did recognize (Pet. App. 24-A):

> This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time con-

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16a/ Pursuant to their attempt below to identify the hours excluded without comment by the district court (see note 6a, supra),plaintiffs determined that the district court had eliminated all hours during the period covered by its award relating to monitoring the final desegregation decree (136.8 hrs.), to services rendered on appeal (231.5 hrs.), and hours expended on the litigation of plaintiffs claim for costs and fees (341 hrs.). The court of appeals held that compensation is due for these services (Pet. App.21-A to 22-A), and that holding is not contested here.

straint, or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at time renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success.

The court therefore held that in such appropriate cases an upward adjustment in the routine hourly rate may be necessary in order to arrive at a "reasonable" fee for particular services rendered.

The court then applied these standards to the second award, involving a claim for 271.25 hours of services. The district court had awarded an average of $31/hr. for these services. The court of appeals, finding that "we have a complete record and conclude that the interests of justice will be served, in light of the long delay in this case, by our recalculation of an appropriate award..," (Pet. App. 28-A), scrutinized the record and found the district court's award to be inadequate. Pet. App. 29-A to 32-A. The court therefore made adjustments to the award, the end result of which was to award plaintiffs' attorneys an average of $63/hr. for these services, in contrast to the $31/hr. awarded by the district

court. With respect to the 74 hours of services which the district court had excluded without findings, the court of appeals determined: "Not only is this cut unsupported in the record, but we conclude that it is clearly excessive given the facts of this case" where "there was little overlapping of services." Pety. App. 29-A. (For that "little overlapping" the court reduced the compensable hours by 5%). The court also rejected the district court's 20% reduction allegedly designed to discount for "parts of issues" on which plaintiffs did not prevail. See Pet. App. 18-A.

The court further found that while the normal hourly federal-litigation rate of $125/hr. for plaintiffs' experienced chief trial counsel was "high for office services," it was "reasonable and supported both by the record and our own experience with fees charged by lawyers of his experience and legal stature for trial services." Pet. App. 39-A. In response to plaintffs' contention that there was a high degree of contingency in this aspect of the case because similar though less extensive Board-proposed modifications of the desegregation plan had been approved over plaintiffs' objections during each of the three

preceding years, the court of appeals found that although "there was a real element of contingency as to whether the attorneys would be compensated for their services at all," the contingency element was reduced by other factors, primarily by the fact that "the burden was on the Board" which "here was seeking to alter a final judgment of the district court which had been arrived at only after many years of bitter litigation." Pet. App. 31-A. The court therefore concluded that an award adjustment of only 10% was adequate to arrive at a reasonable fee in light of the contingency factor. Id.[17a/]

The Board (but not the City) petitioned the court of appeals for rehearing, with suggestion for en banc consideration, which was duly denied without dissent.

17a/ The court also affirmed the district court's disposition with respect to costs and out-of-pocket expenses, except for the denial of photocopying costs. These issues are not before the court. See note 17, supra.